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New York (Sist) Reports.

REPORTS

OF

PRACTICE CASES,

DETERMINED

IN THE

COURTS OF THE STATE OF NEW-YORK:

WITH

A DIGEST OF ALL POINTS OF PRACTICE EMBRACED IN THE STANDARD
NEW-YORK REPORTS ISSUED DURING THE PERIOD
COVERED BY THIS VOLUME.

BY

AUSTIN ABBOTT,

COUNSELOR AT LAW.

NEW SERIES.

VOL. XII.

NEW-YORK:

DIOSSY & COMPANY.

1872.

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ERRATA.

On p. 317, 9th line from bottom, for "LEONARD, J.," read "LEARNED, J."

On p. 365, for "John H." read "John S." Washburn.

On p. 427, in first two lines of second head note, instead of "a receiver of partnership property has been irregularly appointed," read "a receiver's sale of partnership property has been irregularly authorized."

ABBOTT'S PRACTICE REPORTS.

NEW-YORK.

NEW SERIES.

TINNEY *against* THE NEW JERSEY STEAMBOAT
COMPANY.

*Supreme Court, Third Department, Third District;
General Term, January, 1872.*

EXPERT EVIDENCE.—EXCESSIVE DAMAGES.

Persons who have been for many years in the business of transportation of passengers and are acquainted with the methods of the construction of steamboats, and the way in which the berths are put in, are competent to testify as to whether the berths on a certain steamboat were constructed in the manner usual upon the best boats built at the time of its construction.

In considering the damage arising from peculiar injuries to the body, great weight should be given by the jury to the opinion of scientific witnesses accustomed to investigate the causes and effects of such injuries; and a distinction should be made in favor of the opinion of those accustomed to use the most perfect instruments and processes, and who are acquainted with the most recent discoveries of science and most improved methods of treatment and investigation.

A verdict of five thousand dollars damages set aside as excessive, where the plaintiff's injury resulting from defendants' negligence was a temporary loss of sight in one eye, which did not prevent him from carrying on his usual business.

Appeal from an order denying a new trial.

John C. Tinney sued the New Jersey Steamboat
N. S.—XII—1

Tinney v. New Jersey Steamboat Co.

Company for injuries suffered by him while being carried as a passenger on one of the defendants' line of steamboats from New York to Albany. The plaintiff embarked on the defendant's boat "Dean Richmond," at New York, and retired to sleep in a berth furnished him by the company, and to which his ticket entitled him. When the boat reached the dock at Albany, from some cause or other, the berth above that in which the plaintiff was sleeping, together with a passenger sleeping therein, fell down and injured the plaintiff's eye. On the trial, the plaintiff, in his behalf, and to prove that a permanent dimness of vision has resulted to him from the accident, called Dr. Whitbeck, who testified accordingly, but on cross-examination said, that he did not use the ophthalmoscope, or stereoscope, and did not make a specialty of diseases of the eye. That if he had used the stereoscope he might have been led to attribute to other causes the effects which he supposed were due to dimness of vision.

The defendant then called Dr. Robertson, who testified that he made a specialty of diseases of the eye, used the ophthalmoscope and stereoscope, and by their aid had examined plaintiff's eye, and discovered no indications of permanent loss of vision.

The defendant also called Messrs. Dumont & Harcourt, who testified that they were respectively the general agent and general managing agent of the defendant, and had been so for many years, and were acquainted with the construction of berths in steamboats generally. They were then asked:

"Were the berths on the Richmond constructed in the most approved manner of the best steamboats built about their time and since?"

Plaintiff objected that the witness was not competent. Objection sustained and exception taken.

Tinney v. New Jersey Steamboat Co.

At the close of the case, the defendant, among other things, requested the court to charge:

"*Twelfth.* Considering the extraordinary character of the injuries alleged in this case, and the great difficulty attendant upon their proper investigation, great weight should be given by the jury to the opinion of scientific witnesses, accustomed to investigate the causes and effect of injuries to the eye, and a distinction should be made in favor of the opinion of those accustomed to use the most perfect instruments and processes, and who are acquainted with the most recent discoveries of science and most improved methods of treatment and investigation."

The court refused so to charge, saying to the jury:

"That is all a question for you. It is not the business of the court to settle the weight of evidence."

To this refusal defendant excepted. The jury gave a verdict for the plaintiff with five thousand dollars damages.

A motion by defendant upon the judge's minutes for a new trial on the ground that the verdict was against evidence and on the ground of excessive damages, was refused.

From the judgment entered on the verdict and from the order denying a new trial, defendant appealed to the general term.

W. P. Prentice, for defendant, appellant, on the point that the judge erred in refusing to charge the twelfth request, cited *Tucker v. Williams*, 2 *Hill.*, 562; *Anthony v. Smith*, 4 *Bosw.*, 503; *Smith v. Gugerty*, 4 *Barb.*, 614; *Brehm v. Great Western R. R. Co.*, 34 *Id.*, 250).

Beach & Smith, for plaintiff, respondent.

BY THE COURT.*—We think that the judge erred

* Present, MILLER, P. J., and POTTER and PARKER, JJ.

Tinney v. New Jersey Steamboat Co.

upon the trial, in the rejection of evidence offered to prove by the witnesses Dumont & Harcourt, the manner in which the berths of the steamer were constructed. The testimony was material, and bore upon the question of the defendant's negligence; and the witnesses, from their knowledge and experience, were competent to testify on the subject.

The court committed an error in refusing to charge the twelfth request made by the counsel for the defendant. The proposition there laid down was correct and should have been presented to the jury.

There was also error in refusing the motion for a new trial upon the minutes, upon the ground that the damages were excessive. The amount on the verdict was large, and not commensurable with the character of the injury, which was merely a temporary loss of sight, if any. It evinces that the jury must have been misled, not prejudiced, and presents a case for the interference of the court for that reason.

As the grounds stated are sufficient to authorize a new trial, it is not important to examine the other questions raised.

The judgment and order must be reversed and a new trial granted, with costs to abide the event.

Mayer v. Louis.

MAYER *against* LOUIS.*Supreme Court, First District ; Special Term,*DEMURRER.—INSUFFICIENCY OF DEFENSE.—LAWS
OF FOREIGN STATE.

Where the defense sets up that the contract sued on is usurious according to the laws of a foreign State, the answer must show that the contract was governed by the law of such foreign State.

Demurrer to answer.

Elias Mayer sued Adolph Louis and Henry Rosenheim, in the New York supreme court. The complaint charged the defendants as partners, and was founded on two certificates of deposit. These certificates were set out. They were signed A. Louis & Co. (the alleged partnership name of defendant), and acknowledged the receipt of money from the plaintiff, "payable with interest at the rate of eight per cent. per annum until paid." These certificates were dated at Cincinnati. The defendant Rosenheim answered, denying the material allegations of the complaint, and setting up as a separate and distinct defense, as follows :

"That said alleged instruments were made and said sums therein deposited upon the corrupt, unlawful and usurious agreement between said plaintiff and said defendant Adolph Louis (who is the son-in-law of said plaintiff), in the name of defendant's firm, that the defendants should pay the plaintiff for the loan of said sums of money, a greater sum than at the rate of six per cent. per annum as interest thereon, to wit, at the rate of eight per cent. per annum, contrary to the

Stuyvesant v. Grissler.

laws and statutes of the State of Ohio, in such case made and provided."

To the separate defense the plaintiff demurred, as not stating facts sufficient to constitute a defense.

Adolph L. Sanger, for plaintiff, in support of demurrer, cited section 246 of the Code, and the Laws of Ohio, by which parties may agree in writing for any rate of interest not exceeding ten per cent. per annum.

George T. Langbein, for defendant, opposed.

INGRAHAM, J.—The defense demurred to is bad, because it does not show that the contract was governed by the laws of Ohio, or made to be performed in that State.

By section 326 of the Code, the laws of a foreign State may be read from the published volume of the laws. The law cited by the plaintiff shows that the rate of interest charged is allowed by that State.

Judgment for plaintiff, on demurrer.

STUYVESANT *against* GRISSLER.

New York Superior Court; Special Term,
1868.

EJECTMENT.—ESTOPPEL.—FORECLOSURE.—SUMMARY
PROCEEDINGS.

A. leased premises to B. and subsequently took a mortgage on B.'s leasehold interest. Afterward A. took possession of the premises

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by summary proceedings, for the non-payment of rent, and then commenced proceedings to foreclose the mortgage. In his complaint he set out the mortgage as covering the premises "with the leases and terms of years yet unexpired of said B., of and in said premises." The judgment directed that "the mortgaged premises described in the complaint be sold and the purchaser at such sale be let into possession, on production of the sheriff's deed." The advertisement of sale contained a similar description, and the sheriff's deed conveyed to the purchaser the premises as thus described. The purchaser at the sale went into possession of the premises. A. then brought an action of ejectment against C., claiming that by the summary proceedings B.'s lease was terminated, and that all that C. purchased was B.'s right to redeem the premises within one year. *Held*, that by the foreclosure proceedings, A. was estopped from denying that the lease was still in existence and that C. must be taken to have bought B.'s unexpired term.

It seems, that under 2 *Rev. Stat.*, 505, § 30, allowing the landlord to bring an action of ejectment for the recovery of demised premises where the rent is half a year in arrear and the landlord has a subsisting right of re-entry, such action may be sustained against one holding as assignee of a part only of the demised premises, notwithstanding the statute does not provide for apportioning the rent, and though no such apportionment is made.

Motion for the appointment of a receiver.

Joseph R. Stuyvesant brought ejectment against Gottlieb Grissler and others. The facts are as follows :

In July, 1867, the plaintiff, being the owner of part and the lessee of another part of certain premises in this city, leased them to Browning & Moore for a term of ten years from May 1, 1868, at an annual rent of six thousand dollars. The lease contained a provision, that all improvements and additions to the buildings on the premises should at the expiration of the term, be surrendered to the lessor.

In August, 1868, Browning & Moore, to enable them to alter, improve and add to the buildings and to erect others thereon, borrowed twenty thousand dollars of plaintiff (their landlord), and gave him a mortgage on their leasehold interest in the premises, and which

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mortgage also included their leasehold interest in a portion of another lot, leased by them from one Richards.

In constructing the alterations, &c. to the buildings, Browning & Moore became indebted to a large number of mechanics, including the defendants, Grissler & Fausell, who finally, and prior to April, 1869, filed notices under the statute, of their respective liens upon the premises.

Nine months' rent of the premises leased by the plaintiff to Browning & Moore remaining unpaid on February 1, 1869, the plaintiff instituted proceedings in a New York district court, to recover possession of the premises; and on April 1, 1869, a judgment was entered, that the plaintiff have possession thereof. A warrant was issued and the plaintiff put in possession of the leasehold premises, including all the improvements, alterations, &c., of Browning & Moore, which had cost upwards of fifty thousand dollars.

After having obtained and while in possession of the leasehold premises, the plaintiff, on April 2, 1869, brought an action in this court, to foreclose the mortgage from Browning & Moore, to himself, which had then, by its terms, become due and payable. To that action the several mechanics' lien creditors, including the defendants in this action, were made defendants.

The complaint in that action alleged the making, delivering and recording of the mortgage, and that the defendants, Browning & Moore, had failed to comply with its condition, by omitting to pay the interest; and that the whole principal of twenty thousand dollars, had, thereupon, become due and payable.

The several lien creditors who were made parties, were alleged to have some interest in the mortgaged premises, but which, it was averred, had accrued subsequently to the lien of the mortgage.

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The relief demanded was, that the defendants therein might be barred and foreclosed of all right, claim, lien and equity of redemption in the mortgaged premises; and that the said premises might be sold, and out of the proceeds, the plaintiff might be paid his mortgage debt, &c.

The defendants, Grissler & Fausel, answered the complaint, setting up their mechanics' lien and claiming priority of payment out of the proceeds of sale. Their right to such priority was denied by the court, and a judgment in accordance with the prayer of the complaint was entered.

The judgment of foreclosure and sale adjudged that the mortgaged premises be sold by the sheriff, and directed the payment, out of the proceeds, of the mortgage debt with interest and costs, and any liens upon the premises at the time of sale, for taxes or assessments, and all *rents due by Browning & Moore upon the leases mentioned* in the mortgage; and that the defendants, mortgagors and lien creditors, be barred, &c.

Pursuant to such judgment, the sheriff advertised that he would sell at public auction, the premises, describing them as contained in the judgment, without stating the nature of the interest in them, whether leasehold or in fee.

At the sale the defendants Grissler & Fausel became the purchasers, at the sum of thirty thousand dollars, and signed an agreement of purchase, to the effect that they had purchased the premises described in the advertisement of sale, on the terms and conditions contained in the terms of sale thereto annexed, and which contained no reservation or exception, except that the fixtures attached to the premises were not sold under the judgment.

The sheriff executed and delivered to the defendants, Grissler & Fausel, a deed of the premises, con-

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veying them as described in the mortgage and judgment.

Grissler and Fausell went into possession of all the premises conveyed to them by the sheriff's deed, which included, besides the premises leased by the plaintiff to Browning & Moore, the portion of a lot leased to them by Richards.

After Grissler and Fausell went into possession under the sheriff's deed, they expended in further alterations of and additions to the premises, upwards of thirteen thousand dollars.

The action in which this motion was made, was to recover the possession of the premises, which the plaintiff alleged were wrongfully withheld from him by the defendants.

The premises sought to be recovered in this action were no part of the leasehold property obtained from Richards.

The motion was for the appointment of a receiver of the rents of the premises, pending the action.

One of the allegations on the part of the plaintiffs was, that Grissler & Fausell, in bidding and purchasing at the sale, knew that the mortgage was of the leasehold interest of Browning and Moore, and that they had been dispossessed by the plaintiff, their landlord. But the defendants denied that the plaintiff had, at any time, or in any manner, before the commencement of this action, claimed the right to the possession of the premises under the dispossessing proceeding in the district court. And they claimed that they acquired, under the sheriff's deed, the whole of the unexpired term, granted by the lease to Browning & Moore.

Douglass Campbell, for the motion.—I. A receiver may be appointed in an action for the recovery of real estate, and damages for the withholding of the same. The Code is explicit upon the subject, and in a case in

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this court exactly in point it was so held (*Ireland v. Nichols*, 37 *How. Pr.*, 222; S. C., 1 *Sweeny*, 208); also so held in the supreme court (*Rogers v. Marshall*, 6 *Abb. Pr. N. S.*, 457).

II. The plaintiff not only shows an apparent title to the property, but shows an absolute title founded on documentary evidence. The lease was terminated by the summary proceedings, the statute providing that upon the issuing of the warrant, the lease shall terminate (2 *Rev. Stat.*, 515, § 43). There was nothing to foreclose except the right of Browning & Moore to redeem within a year, by payment of the rent in arrear, and the costs of dispossession, and also the lease by Richards to Browning & Moore. This right to redeem was a valuable right, on account of the improvements which had been made by Browning & Moore. The plaintiff was obliged to foreclose this, else he could do nothing with the property for a year, within which time, Browning & Moore, or any of their creditors, might redeem (*Laws of 1842*, ch. 240, § 1; 3 *Rev. Stat.*, 5 ed., 840, § 54).

III. The right to redeem, together with the lease of Richards' lot, was all that existed to foreclose, and all that could be sold by the sheriff (2 *Rev. Stat.*, 192, § 158). As to the effect of a foreclosure, see *Vroom v. Ditman* (4 *Paige*, 531). The statute does not intend to provide that the master's deed shall pass all the interests of all the parties to the suit in the property, but only those interests which are properly litigated in it (*Lewis v. Smith*, 9 *N. Y.* [5 *Seld.*], 516; see, also, S. C., 11 *Barb.*, 158).

IV. Nothing more than the mortgagor's interest could pass, unless an estoppel comes in. But no principle of estoppel applies here. The defendants knew all the facts, and in an affidavit read by their counsel, set up the facts of the dispossession; and notice to an attorney is notice to a client (*Griffith v. Griffith*, 9 *Paige*,

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315; Howard Ins. Co. v. Halsey, 4 *Sandf.*, 572; 2 *Kent Com.*, § 630, note 1, and cases cited in 11 ed.). Even had they known nothing of the dispossession, no estoppel could operate against the plaintiff for not mentioning it. He was not asked regarding it, made no effort to conceal it, practiced no fraud, and the purchasers bought at their own risk.

John J. Townsend, opposed.

MONELL, J.—The power of the court to appoint a receiver, in an action to recover the possession of real property, having been determined by this court in *Ireland v. Nichols* (1 *Sweeny*, 208), I am not at liberty to examine the question, and must regard it as settled, notwithstanding doubts of its correctness may have been raised by the very able argument of the defendant's counsel. That decision, however, goes only to the *power* of the court, leaving it still discretionary to appoint, or to refuse to appoint a receiver, as the facts of the case shall seem to justify. The plaintiff claims to recover the possession of the premises on the ground, *First*. That under his proceedings and judgment in the district court he was put in possession, and thereby, by force of the statute (2 *Rev. Stat.*, 515, § 43), the lease to Browning & Moore, and the relation of landlord and tenant, was canceled and annulled; or, *Second*. That as landlord, he may maintain the action, under the right reserved in the lease, of re-entry for the non-payment of rent (2 *Rev. Stat.*, 505, § 30). That statute provides, that whenever a half years' rent shall be in arrear from a tenant to his landlord, if the landlord has a subsisting right by law to re-enter for the non-payment of such rent, he may bring an action of ejectment for the recovery of the possession of the demised premises. It is very clear, I think, that this action cannot be sustained upon the *second* ground. The statute relied on gives an action

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by a landlord against his *tenant*, to recover from such *tenant* the possession of demised premises. It does not give an action against those who succeed to the tenant unless, possibly, it be to the whole premises and to the whole term. But where demised premises are held in severalty by different persons, although having a common source of title, a landlord cannot proceed against all collectively, although he may, perhaps, against each separately. The statute does not provide for apportioning the rent among those who have severally succeeded to the rights and interests of the tenants of the whole premises, yet, I think, it may be done, and an action be maintained for the recovery of a portion, from one holding as assignee of a part only of the demised premises. I am therefore of opinion, that an action under the statute can be maintained for the recovery of the possession of a part only of demised premises, against a person in possession of such part, under the re-entry clause in the lease, notwithstanding there has been no apportionment of the rent, and without making such apportionment. No demand of rent is necessary. If rent is in arrear, the landlord may by action re-enter upon the whole, or upon any part which may be separately held (*Main v. Green*, 32 *Barb.*, 448; *Jackson v. Wyckoff*, 5 *Wend.*, 53).

But under the statute, the action can be maintained only where the relation of landlord and tenant exists, and where the landlord has a "subsisting right by law to re-enter."

In the lease before me, the landlord expressly reserved to himself the right to re-enter, and if he had not deprived himself of such right, by destroying the relation of landlord and tenant, and by extinguishing or causing to be canceled and annulled the instrument which contains the reservation, I should be of opinion that this action could be sustained under the statute.

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The effect, as declared by the statute, of a judgment in favor of a landlord in summary proceedings to recover possession of land (2 *Rev. Stat.*, 515, § 43) is, to cancel and annul the agreement for the use of the premises, and extinguish the relation of landlord and tenant; and, with the single exception of the right to collect rent due prior to the eviction (*Hinsdale v. White*, 6 *Hill*, 507; *Whitney v. Meyers*, 1 *Duer*, 266), the lease becomes void for every purpose, from and after the judgment and the possession of the landlord under it.

The right to re-enter for non-payment of rent is in the nature of a forfeiture (*Doe dem. Wheeldon v. Paul*, 3 *Carr. & P.*, 613), and the plaintiff having once enforced the forfeiture and re-entered upon the premises, he exhausted his remedies. The relation of landlord and tenant terminated, and with it all right of either party under the lease, except to recover rent down to the time of eviction.

The action in this case is a possessory action, and the plaintiff having re-entered for a forfeiture, his possession cannot be secured or continued by a second judgment for the same forfeiture. In *Clowes v. Hakes* (2 *Caines*, 335), the tenant having absconded while rent was in arrear, the landlord took possession of the premises and brought ejectment under the statute, in order, as was claimed, to bar the tenant's right under the lease. But the court held it to be against the whole theory of the action. To sustain a right of action under the statute, the plaintiff must not only establish an existing relation of landlord and tenant, but a subsisting right by law to re-enter. If, therefore, he claims that he was lawfully in possession under the proceedings in the district court, and has been casually ejected by the defendants, then he cannot but claim that the lease to *Browning & Moore* is canceled and annulled, and that all relation of landlord and tenant has ceased; and in that aspect, that the de-

defendants were mere trespassers. If that be so, then the plaintiff has no subsisting right by law to re-enter under the statute. The defendants, Grissler & Fausell, must be treated either as tenants or trespassers. If the former, it can only be by a revival of the lease to Browning & Moore, through the foreclosure and sale, and that, I understand, the plaintiff rejects. If treated as trespassers, then it is clear the statute has no application.

My examination, however, of the other facts presented in this case, has led me to the conclusion that the defendants cannot be treated as trespassers, but must be treated as having acquired the whole of the unexpired term of the lease to Browning & Moore, and, therefore, as being lawfully in possession of the demised premises. If I am correct in the effect which I give to the purchase under the foreclosure sale, then the lease was revived, the relation of landlord and tenant restored, and the plaintiff may have all the remedies, which, in that relation, he could have had, as against his original tenants, before the summary proceedings were instituted, and as if these proceedings had never been instituted. Of course this conclusion goes to sustain the right of action under the statute; but as the plaintiff has not made the forfeiture his cause of action, but has proceeded against the defendants as mere trespassers, thus ignoring the lease and their holding under it, he cannot, under his present complaint, be permitted to show facts which would bring him within the statute.

The mortgage of Browning & Moore was of their leasehold interest in the demised premises, and so far as it operated as a conveyance, it was an assignment by the lessees to the lessor of the lease. It did assign to the plaintiff (with a defeasance), all the rights and interests of the tenants in the lease and premises, including their right of redemption given by the statute.

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The plaintiff, however, was not a mortgagee in possession. The lessees and mortgagors still held the possession, and were liable, under the covenant, for the payment of rent, and the mortgage effected no merger of the leasehold estate in the plaintiff. Upon default in the payment of the rent, it was competent for the plaintiff to proceed summarily to get possession of the demised premises and annul the existing relation of landlord and tenant. The effect of the judgment in these proceedings, if nothing subsequently had transpired, would have been to have merged the two estates of the plaintiff into one (except as to the small portion covered by the Richards lease), and the result would have been, that the plaintiff would have had the leasehold estate, discharged of the lease, and the equity of redemption under the statute, blended in one; and as respects all the property, except the Richards lots, could have held it discharged of all claims created by the mechanics' liens. The plaintiff, as assignee of the equity of redemption, could redeem under the statute; and as there were no judgment creditors, he alone could redeem. The plaintiff's position was, therefore, quite impregnable. He had possession, a canceled lease, and the only right of redemption, as far as the proofs show, which resided anywhere.

The remaining ground to be examined, is, whether Grissler & Fausell acquired any interest in the premises, as against the plaintiff, under the sheriff's deed. Undoubtedly they did not, unless we can apply the doctrine of estoppel. Under the proceedings in the district court, the plaintiff regained his former estate, discharged of the lease; and had the mortgagee of the lease been a stranger, the lien of the mortgage would have been gone, and nothing but the bare right of redemption left; and upon its foreclosure, the purchaser would have acquired no right to the possession of the premises, but only a mere right to redeem. But the

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mortgagee was the landlord, who, when he had regained his former estate, could, in respect to all the property except the Richards lot, have canceled the mortgage, or merged it in his higher estate, or could have held it intact, until the time for redemption had passed. As has been stated, the plaintiff was, at the time of the foreclosure, the sole owner of the right to redeem, but he could not redeem from himself, and there were no judgment creditors.

The action to foreclose the mortgage was doubtless instituted under the erroneous impression and advice, that it was necessary, to bar and foreclose the right to redeem the lease, which was still outstanding. But the foreclosure had not, and could not have had any such effect. The mortgage operated as a transfer of the right to redeem, but it did not, and could not, extinguish such right in others; and the foreclosure, therefore, merely barred the right to redeem the *mortgage*, and in no way affected the right to *redeem the lease*. So that, notwithstanding the foreclosure and sale, any person named in the statute could have availed himself of the right to redeem the the lease. It was, therefore, in my opinion, unnecessary to foreclose the mortgage for any supposed purpose of barring any equity of redemption there might have been in the creditors of the lessees. Nor was it necessary to foreclose it to obtain payment of the mortgage debt, except in the possible event of a deficiency, as the mortgagee was in possession, under a higher title, of the subject mortgaged. But the plaintiff saw fit to foreclose his mortgage, making the mortgagors and the several mechanics' lien creditors, parties. In his complaint, the mortgage is set out as covering the premises "*with the leases and terms of years yet unexpired of said Browning & Moore, of and in said premises,*" and it is verified by the plaintiff to the effect that the matters stated were true. The judgment contains the same

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description of the subject mortgaged, and directs that the "*mortgaged premises described in the complaint*" be sold, and the "*purchaser at such sale be let into possession, on production of the sheriff's deed.*"

The advertisement of sale contained a similar description, and the sheriff's deed conveyed to the purchaser the premises as thus described.

But the mortgage itself, which the plaintiff undertook to foreclose, was, clearly and by its tenor, a mortgage upon the lease and leasehold interest of Browning & Moore; and hence the judgment was a foreclosure of such interest, and nothing other than such interest passed to the purchaser, or was conveyed to him by the sheriff's deed.

The question then arises, can the plaintiff now claim that no such interest, or any interest whatever, passed to the purchaser under his judgment of foreclosure and sale? I think not. He must, it seems to me, be estopped by his representation, that the mortgage he undertook to enforce, was a subsisting lien, and that the subject covered by it was *in being* at the time. Such representation amounted to the assertion, that the lease to Browning & Moore was not canceled or annulled, nor the relation of landlord and tenant between the plaintiff and themselves ended. An estoppel, whether of record or *in pais*, is founded on a preclusion in law, which prevents a man from alleging or denying a fact, in consequence of his own previous act, allegation or denial, of a contrary tenor (1 *Bouv.*, 482); and, according to BLACKSTONE, where a man has done some act, or executed some deed, which estops or precludes him from averring anything to the contrary. Three things must unite: *First*. The former representation must be inconsistent with the present assertion. *Second*. The other party must have acted upon; it and, *Third*. That he will be injured if the claim is allowed. Whether this is to be regarded,

therefore, as an estoppel by *record*, and binding upon parties and privies only ; or as an estoppel *in pais*, the facts furnish all the necessary elements, and preclude the plaintiff from contesting them by asserting now, that the substance which he alleged to exist did not exist, and that the purchaser had paid thirty thousand dollars for a shadow. An illustration of an estoppel by record is found in the case of *Van Orman v. Phelps* (9 *Barb.*, 500), where a plaintiff, in his petition for a partition of lands, alleged that he and *one Land*, together with the other defendants, were tenants in common. In a subsequent action by the same plaintiff individually, for a trespass upon the lands, he was held to be estopped by the former record from denying that *Land* was a tenant in common. The principle which gives effect to representations of this nature, is not unlike that which underlies implied warranties or guaranties, where mere descriptions of the things sold or transferred are held to impliedly warrant the existence of the thing. As in the case of an assignment of a judgment, describing it as a judgment for six thousand five hundred and seventy-four dollars and seventy cents, but with no expressed guaranty that such sum was due and unpaid ; held that a warranty could be implied (*Furniss v. Ferguson*, 15 *N. Y.*, 437). And in a recent case in this court (*Corwin v. Wesley*, decided December 30, 1871), where, in an assignment of a chattel mortgage, it was described as "a certain mortgage on goods and chattels," without any words of warranty, it was held that it might be implied that the assignee warranted that it was a valid mortgage. In that case the mortgage was a forgery, and the assignee recovered of the assignor on the implied warranty. Also, see *Delaware Bank v. Jarvis* (20 *N. Y.*, 226 ; *Story on Sales*, § 336).

In conclusion, I am of the opinion, that the plaintiff is estopped from alleging or claiming that the

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leasehold estate of Browning & Moore ceased with the proceedings in the district court; or that the lease to them was thereby canceled and annulled. On the contrary, he has, by his acts, revived it into existence, and restored the term which otherwise would have been gone. So that, in legal effect, the purchasers at the foreclosure sale became the owners of the unexpired term, taking as assignees of the lessees and subject to their covenants. And in this view the defendants, Grissler & Fausell, as tenants, are subject to all the remedies which the plaintiff, as landlord, can have under the lease; and to the same extent as if they were in possession as the direct assignees from Browning & Moore. In an equitable point of view, the position of the plaintiff is not agreeable to good conscience. If sustained in it, he would have the premises with all the valuable improvements, and his mortgage debt besides, and the defendants would be the losers of their bid, and, possibly, of the sums since expended. It is better that the plaintiff should recognize the defendants as his tenants, and be content with his rights as their landlord. Being of the opinion that the plaintiff can only re-enter as landlord as for a forfeiture under the lease, it follows that he must fail in this action, unless he conforms his complaint to such a state of facts.

The present motion must therefore be denied, with ten dollars costs.

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NEW YORK AND BOSTON RAILROAD COMPANY *against* GODWIN.

*Supreme Court, Second District ; Special Term,
December, 1871.*

NECESSARY PRELIMINARIES TO APPOINTMENT OF
COMMISSIONERS OF APPRAISAL, UNDER GENERAL
RAILROAD ACT.

Before commissioners of appraisal can be appointed under the general railroad act, the preliminary provisions of the act must be complied with strictly and chronologically.

The notice to actual occupants of the route intended to be adopted, and of the filing of the map, required by section 22 (as amended, *Laws of 1871, ch. 560*), must be given ; and the fifteen days thereafter allowed the owner to apply for a change of the route must elapse, before commissioners can be appointed.

A map containing only a single line showing the general course of the proposed railroad, is not a sufficient compliance with the act. It should show the extent of the land proposed to be taken, and should be sufficiently accurate and full to enable a plain man to understand the location and boundaries of every parcel. The profile required by the act should be upon the same sheet.

Commissioners of appraisal cannot be appointed until an attempt to agree with the owner has been made and has failed.

Motion for the appointment of commissioners of appraisal under the general railroad act.

The facts sufficiently appear in the opinion.

Porter, Lowrey & Soren, and R. W. Van Pelt,
for the New York and Boston Railroad Company.

Strong & Shepard, for the land owners.

GILBERT, J.—The New York and Boston Railroad

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Company, incorporated under our general laws, seek to acquire title to a route through three certain parcels of land in Yonkers and West Farms, owned and occupied respectively by Godwin, Peck, and Valentine, against the consent of the owners, under and by virtue of the provisions of the general railroad laws of this State. These laws are to be construed harmoniously, as respects their various provisions; and strictly, as to the rights of the parties. By conforming to the provisions of these laws, corporations may acquire a title in fee to the lands necessary for their purposes, against the will of the owners; but such corporations must conform to such provisions, before they can acquire any title or rights thereto.

A fair construction of these laws will require a chronological fulfillment of their provisions. Under section 28, railroad corporations may enter upon the lands or waters of any person, to examine, survey and select the most advantageous route. Under section 22, they shall, before constructing any part of their road into or through any county, file a map and profile of the route, certified as directed, in the register's office (or county clerk's office, as the case may be), and give written notice to the actual occupants of the land over which the route is designated, of the time and place such map and profile were filed, and that the route passes over the land of such occupant (*Laws of 1871*, ch. 560). If such occupant does not take the statutory steps within fifteen days to secure a review, or alteration of the route, the route may be considered settled, and his right thereafter to object to its location as lost. Under section 14, those corporations may apply, upon ten days' notice, for the condemnation of lands which they have been unable to acquire by agreement with the owner, through the process of the appraisal of the compensation to be paid by the company to the owners and parties interested. The subsequent details of

the statutes are omitted for the sake of brevity ; the present object being to set forth in their order, the necessary preliminaries and conditions down to the appointment of commissioners of appraisal, upon which corporations may become vested with the privilege of invoking the sovereign power of the people, to wrest his property from a private owner, and transfer it to them, by virtue of the right of eminent domain.

When this company, the present petitioner, brought these land owners as parties into court, each of them put in a verified answer, denying the jurisdictional allegations of the petition. A reference was had, and to the referee's report both parties filed exceptions ; so that the case comes before the special term upon the original testimony and all the proceedings, each party claiming that a trial has been had, and each endeavoring to secure a judgment in their own favor.

I find, as a matter of fact, that the company has been engaged in constructing their road in Westchester county for a period of fifteen months, and that they never served the written notice as specifically required by section 22 of the act. It was, however, contended by the counsel of the company, that it was not necessary to serve that notice before applying for the appointment of the commissioners of appraisal, and that the petition itself was a sufficient compliance as to that notice. Neither of these grounds can be sustained. There is no sentence in the petition containing the exact notice required as to the route passing over the land ; and the object of the notice, which is to give the property owner the opportunity to secure a review and change of the route, would be defeated by such a construction. In the first instance the company has the right to arbitrarily locate the route ; but the statute then gives the right to the property owner to secure a change of that location, if he can show cause for

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changing it to the satisfaction of three persons to be appointed by the court to determine the question. This right of the property owner may be material and valuable, in view of the manner in which the railroad may cut his property and affect the highways and other objects in the neighborhood. At any rate, it is a right given to him by the statute, and it is not for a corporation, nor for the court, to deprive him of it.

The motion for the appointment of commissioners of appraisal is not a separate proceeding, and independent of the section requiring the service of the written notice of location of the route; for it would be absurd either to appoint commissioners to appraise the value of property which could not be definitely described, or to describe property which might not come under appraisal at all; and one of these incongruous conditions would arise, if the motion for the appointment of commissioners could be made before the right of the property owner to a change of route was exhausted. The orderly course is to have the property which is to be condemned expressly defined and specified in the order appointing the commissioners, and this cannot be done until the owner's right, under section 22, to effect a change in the railroad route, has either lapsed or been exercised. The numerical order of the sections of the statute, which was insisted upon, is of no consequence. The preliminary survey, under section 28, is to be made before the application for commissioners of appraisal under section 14. A similar necessity requires the notice under section 22 to be given before the right to proceed under section 14 begins, for otherwise, upon a confirmation of the report of the commissioners, the corporation would become vested with the title to lands, which a change of the route would render unnecessary for the uses of a railroad.

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Another objection raised by the property owners was, that the map and profile of the road filed were deficient.

I find that the profile is not on the map, but on a separate sheet, which does not give the land owners' names, so that only an unnecessarily laborious and scientific measurement could connect and identify the profile with the map at any given parcel of land. The better course would be to follow the suggestion of section 31, subdivision 39, and put the profile upon the map; then the profile could be located upon any parcel of ground with facility, and its object, of showing the grade, cut, embankment and slope on every parcel, be at once attained.

I find that the map is not a substantial compliance with the statute. The object of the statute is to secure a public record of the boundaries, location, grade and direction of the railroad, and to enable those interested in the property to be condemned or conveyed, to describe the route by metes and bounds through any and every parcel of land: This the map on file utterly fails to accomplish. The map consists of a sheet on which is laid down only one line showing the general course of the railroad, but whether this line is an exterior, a center, given or any other certain line does not appear. The area of land required for the route is nowhere marked. The Harlem river, which is the route intended to be designated, is nowhere shown. The Spuyten Duyvil & Port Morris Railroad, which is also near it, is not shown. Many of the highways around are not laid down. Not one of the property owners could tell by inspecting the map where the route would cross their property. Even the boundaries of towns are not mentioned. The number of the stake stations differ from those mentioned in the petition. The engineer of the company swore that, with a corps of assistants, and his surveying instruments, he could go on the ground, and, with

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the aid of the map, locate the route. But the statute will not subject an interested party to the expense of such a proceeding to ascertain the location of the railroad, nor does it intend that the knowledge of the route, before the actual grading and construction of the railroad, shall be locked up in the mysteries of science, or be confined to the learned few. The map should be sufficient, exact, complete, so as to be understood by any plain man. Then it will give him and the public the correct information to which they are entitled. Otherwise it is a snare, and will serve purposes of concealment rather than of elucidation.

Railroad companies acquire property for public purposes, and consequently their maps are to be public records, and should be ample and correct in detail. Upon a condemnation, the order of confirmation is to recite the exact boundaries of the real estate, and is to be recorded, and operates as conveyance of the title,—and the map, which is made the original basis of such conveyance, on the first application for the appointment of commissioners of appraisal should be equally accurate and full. This does not at all conflict with the right of a company to alter their route in any part of it under section 23, nor with the mutual right of the company and the land owner to alter by agreement, the route at any given part; but when the route has been thus changed, and is actually graded, and the railroad constructed, then a new map of the whole is to be prepared and filed (section 45); and in the mean time, the intended route is to be mapped fully and accurately, and be open to public examination.

That the objection that the map does not show the land taken, nor anything more than a line indicating the general direction of the railroad, would be good, *if taken in time*, is intimated by the court in the case in 21 *How. Pr.*, 434.

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That the railroad company must show that the land is covered by the authorized location, is the doctrine in *Hazen v. Boston & Maine R. R.* (2 *Gray*, 574), and in *Stone v. Cambridge* (6 *Cush.*, 270).

By section 14 of the act, the map is to be, or be equivalent to, a survey; which means "the act by which the quantity of a piece of land is ascertained; or the paper containing a statement of the courses, distances and quantity of land." By the same section, the petition is to state that the company has located their road according to such survey. But the map filed contains no quantities, and is not in any sense equivalent to a survey, and it would consequently be impossible for the company to show that the lands sought to be acquired are covered by the authorized location.

In respect to Valentine's land, the company made him no offer, and made no attempt whatever to agree with him for its purchase. The statute requires this to be done, and only gives the right to proceed *in invitum*, when such an attempt has proved a failure.

Therefore, as this company has not complied with the necessary prerequisites for obtaining the appointment of commissioners of appraisal, it has not secured the right to have the property condemned against the opposition of its owners.

The proceedings are accordingly dismissed with costs.

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WEST SIDE BANK *against* PUGSLEY.*Court of Appeals, January, 1872.*

APPEAL FROM ORDERS. — PUNISHMENT FOR CONTEMPT.—ACTION BY RECEIVER IN SUPPLEMENTARY PROCEEDINGS.

An order made by a *judge out of court*, may be set aside *by the court*, on motion.

The provision of section 350 of the *Code of Procedure*, which allows certain orders made out of court, upon notice, to be entered with the clerk, and to be appealed from,—does not deny the remedy by motion to the court to set aside a mere *judge's order*.

On an application in supplementary proceedings, for an order compelling a third person to pay over, or apply to the judgment, property in his hands, or a debt, belonging to the judgment-debtor, if such person, under oath, claims an interest in the property or denies the debt, the judge cannot proceed summarily to examine into the fact; but the judgment creditor must be left to the appointment of a receiver of the property of the judgment-debtor, and an action by him against the third party.

A judgment creditor, prosecuting supplementary proceedings against his judgment debtor, cannot compel payment of a *debt* due to the judgment debtor from a third person, by means of process for contempt.

Appeal from an order.

The West Side Bank, having obtained an attachment against the property of James E. Pugsley, in an action in the supreme court, first district, levied it on the balance standing to his account in the Sixth National Bank, and received from the cashier a certificate that, on January 22, 1870 (the day when the levy was made), Pugsley had to his credit in the bank the sum of one thousand and sixty-two dollars and eighty-seven

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cents. Afterwards, and on April 29, 1870, judgment by default was entered for one thousand and ninety-five dollars and fifty-five cents; and, on the same day, execution was issued and levied on the funds which had been attached. The Sixth National Bank refused to pay over the money; whereupon the plaintiff, on May 9, obtained from a judge of the court (who was, during that month, holding the special term of the court at chambers, and was sitting in chambers of the court when he made the judge's orders herein mentioned), an *ex-parte* order commanding "The Sixth National Bank, its officers, agents, attorneys and servants and especially the said A. E. Colson," (the cashier), to surrender to the sheriff all moneys, funds. &c., belonging to Pugsley, "and especially the money heretofore levied upon under the warrant of attachment," or to show cause at chambers before the judge granting the order, why they should not be punished as for a contempt of the court. The order was signed with the judge's full name merely, with the usual addition, "J. S. C.," [Justice of the supreme court.] On the day appointed to show cause, the Sixth National Bank appeared and submitted the affidavit of its cashier, stating that the certificate on the attachment had been given under a mistake of facts, and that, in reality, Pugsley was indebted to the bank to a large amount in excess of his deposit. The judge thereupon made an order that the president, the cashier, and the note teller of the bank appear before him at chambers of the court, on May 14, 1870, and submit to an examination as to the credit of Pugsley with the bank, and that the examination so taken be used on the further hearing of the motion, which was adjourned until two days after the examination. That order was entitled: "At chambers, New York, May 12, 1870," but was signed with the judge's initials only, followed by the

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word "enter," as if it had been an order of the court, and was entered.

The examination was had accordingly, and the judge being of opinion that the Sixth National Bank had no claims upon the money, as against the plaintiffs, made an order, dated September 29, 1870, commanding "the officers" of the bank to pay over the moneys within twenty-four hours after service of a copy of the order, or be committed as for a contempt. The order recited the fact that the motion had been made "on the part of the sheriff;" it was entitled at special term of the court, was signed with the judge's initials and the direction to "enter," and was entered with the clerk as an order of the court.

Upon service of that order, the Sixth National Bank obtained from another judge of the court, an order that the plaintiff and sheriff show cause before "one of the justices of this court, at chambers, at a special term of this court," why the order last mentioned and also that of May 9, should not be set aside and vacated. On the hearing at special term, the motion to set aside the orders was denied, and an order of the court to that effect was entered October 11, 1870.

From that order the Sixth National Bank appealed to the general term of the court for the first department, where the appeal was dismissed, upon the ground that, in the opinion of the court, the order appealed from was not appealable,—not affecting a substantial right,—and that, if the appellants intended to appeal at all, they should have appealed from the order of September 29. The present appeal to the court of appeals was thereupon taken from that order of dismissal.

Burton N. Harrison, for appellants.—I. The order appealed from is appealable to this court. That an

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order dismissing an appeal to the general term of the supreme court is appealable to this court, is well settled (*Bates v. Voorhees*, 20 *N. Y.*, 525; *Maltby v. Green*, 1 *Keyes*, 548; and *In the Matter of Duff*, 10 *Abb. Pr. N. S.*, 410). And, as this is an appeal from an order after judgment, and not from a judgment, the facts are reviewable in this court as well as the law (*Gillig v. Maass*, 28 *N. Y.*, 197; *Griscom v. Mayor, &c.*, 12 *Id.*, 590). This appeal brings up the entire merits of the order (*Bates v. Voorhees*, 20 *N. Y.*, 527-8).

II. The orders moved to be set aside were made under section 297 of the Code. The Sixth National Bank, appellants, were not a party to the action after judgment in which the orders were made, and the judge had no authority to order them to surrender the amount of the pretended credit, to the sheriff, upon the writ of execution, though it was alleged to be the property of the judgment debtor, until they had first been made a party to the proceeding authorized by section 294, and had an opportunity to be heard in answer to the allegation. When such a proceeding was afterwards instituted, and the appellants' officers examined, they denied the alleged indebtedness, and claimed an absolute title and interest in the property in the appellants, adverse to the judgment debtor. By the Code (§ 299), in such a case the indebtedness is recoverable only in an action by a receiver of the property of the judgment debtor (*Edmonston v. McLoud*, 19 *Barb.*, 362; *Tompkins County Bank v. Trapp*, 21 *How. Pr.*, 20; *Rodman v. Henry*, 17 *N. Y.*, 484, citing many authorities). The authority of the cases quoted has never been questioned; it is conclusive. It is only undisputed property of the judgment debtor, which the judge can order to be surrendered in this proceeding. He can never make an order, under section 297 of the Code, where the indebtedness or the

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amount of the indebtedness alleged to be due from the third person is either disputed or uncertain. The assertion of claim by the third party puts an immediate stop to the proceedings. The judge cannot try the validity of the claim in this proceeding—there must be a formal trial in a new action, in which the third party is defendant, and a receiver of the property of the judgment debtor is plaintiff (7 *Robt.*, 64; 1 *Hilt.*, 505; 10 *Abb. Pr.*, 103; 9 *How. Pr.*, 97; 13 *Id.*, 137; 12 *Id.*, 139; 22 *Id.*, 3; 12 *Id.*, 307; 5 *Id.*, 16; 23 *Id.*, 423; 26 *Id.*, 155; 34 *Id.*, 333; 40 *Barb.*, 242). Before the adoption of the Code, the remedies of a judgment creditor, against third parties who were supposed to have the property of the judgment debtor which should be applied on the judgment, were to be pursued only after filing a “creditor’s bill” in chancery and the appointment thereupon of a receiver of the property of the judgment debtor—and, if the third party disputed the claim of the judgment creditor that the property belonged to the judgment debtor, that question was an issue to be tried by a jury in a proceeding in which the third party himself was necessarily a defendant (2 *Rev. Stat.*, 174, §§ 38, 39; 2 *Barb. Ch. Pr.*, 153; *Robeson v. Ford*, 3 *Edw. Ch.*, 442); and, “The trial by jury in all cases in which it has been heretofore used, shall remain inviolate forever” (*Const. of N. Y.*, Art. 1, § 2).

III. The order, from which the appeal was taken to the general term of the supreme court, was an order of the court at special term denying the motion of the Sixth National Bank for an order vacating and setting aside the orders of May 9, and September 29, 1870, which were both orders of a judge merely, sitting as a judge and not as the court. 1. That those were judge’s orders only, is evident with regard to the first from an inspection of it. It is not entitled—it is signed with the judge’s full name—cause is to be shown be-

fore the judge himself, not before "one of the justices of the court"—and, throughout, the judge speaks in the first person. We might rest there, inasmuch as the proceeding having been instituted before a judge out of court, and by him ordered, as judge merely, to continue before him as judge, and not before the court—the court could have no functions to perform in the premises until specially moved, which was not done until appellant's motion was made, October 1, and denied October 11. And although the order next in succession, that of May 12, which adjourned the hearing, is drawn with less accuracy and precision in some of its details, it is still avowedly an order of the judge merely. It is entitled not as an order of the court, but as a judge's order, made out of court, "at chambers, New York, May 12, 1870." It requires appellants' officers to appear before the judge who made it, to be examined, not before the court or "one of the justices of the court." And it shows that it is still the same proceeding which was before the judge, by referring to it throughout as "this motion,"—*i. e.*, the motion under the order of May 9. It was entered with the clerk; but that was merely because the judge, who was holding special term of the court during that month, inadvertently signed it with his initials and the usual direction to enter. The motion being thus before a judge and not before the court, the order in which it resulted should have been so drawn as to express the fact that it was a judge's order merely. The order of September 29 is therefore incorrect as drawn, in that it is entitled as an order of the court. It should, by its title, recitals and form of order, have avowed itself an order of the judge, made out of court—which in effect it was. And it must be so regarded and treated by this court. The books are full of cases, in proceedings similar to this, in which it has been expressly ruled that the mere order of a judge

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does not change its character or acquire any new force or effect, from entitling and entering it as an order of the court. The title does not change the fact, or make the order an order of the court (*Wickes v. Dresser*, 13 *How. Pr.*, 336; see, also, 18 *How. Pr.*, 245; 22 *Id.*, 309; *Matter of Knickerbocker Bank*, 19 *Barb.*, 602, at N. Y. general term; *Dresser v. Van Pelt*, 15 *How. Pr.*, 19; 5 *Abb. Pr.*, 53; 10 *How. Pr.*, 425; *Bitting v. Vandenburg*, 17 *Id.*, 80; *Carter v. Clarke*, 7 *Robt.*, 497; *Matter of Smethurst*, 2 *Sandf.*, 724). 2. Whether these orders are avowedly a judge's orders or not, this court will hold it to be a fact that they are such, and that they could be nothing else, for the Sixth National Bank, the appellants, were not parties to the action, after judgment in which the obnoxious orders were made, but were third parties, and section 297 of the Code, which, in a proper case, is the authority to a judge to make orders like those moved to be vacated, does not give any such power to the court—and the court cannot claim it from any other source (*Miller v. Rossman*, 15 *How. Pr.*, 11; *Davis v. Turner*, 4 *Id.*, 190; *Bitting v. Vandenburg*, 17 *Id.*, 80; *Carter v. Clarke*, 7 *Robt.*, 497; *Hawes v. Barr*, *Id.*, 454; *Kelly v. McCormick*, 2 *E. D. Smith*, 503; *Matter of Smethurst*, 2 *Sandf.*, 726; *Fenner v. Sanborn*, 3 *Id.*, 613; *Joyce v. Holbrook*, 2 *Hill.*, 95; 13 *How. Pr.*, 465, 470). There has never been, then, any difficulty or hesitation about holding that such orders as those of May 9 and May 12 in this case are and must be treated as orders of a judge merely, and not of the court—however entitled. And, 3. In the common pleas and New York superior court there has never been any doubt as to the rule that such an order as that of September 29,—which is an order that appellants' officers be committed as for contempt if they continue to disobey the order of May 9,—can be made only by the judge (*Code*, § 302) whose order has been disobeyed, and not by the court.

And, although in a few reported cases in several of the districts of the supreme court, there occur unguarded expressions which seem to indicate that some of the justices have supposed that the order of commitment *may*, upon occasion, be made by the court, as well as by the judge—reference to such cases will ascertain the fact that they all refer to and rely upon the decision of Justice CLERKE in *Wickes v. Dresser* (13 *How. Pr.*, 331) as the authority which excuses them from an inquiry into the reasons for the opinion. But an examination of that decision shows that, although the learned judge there gives what he considered several reasons which, in a case requiring it, would induce him to hold that the court may punish as for contempt of a judge's order, he expressly says that he did not then pretend to so decide, because it was unnecessary to pass upon the point in the case before him, and his decision of the case went upon another and very different ground. And even his reasoning upon the question was discredited in the later case, between the same parties, where it was relied upon by one of the counsel (reported in 14 *How. Pr.*, 465), when, as Justice INGRAHAM says (45 *Barb.*, 344), "the contrary rule was adopted"—and where the court expressly held that the court has no power to make even the order of commitment. "The court, as such, cannot punish, because no contempt is shown to its authority, and no power is given to it to punish for contempt of the orders of the judge" (Matter of Smethurst, 2 *Sandf.*, 726, with which agrees *Kelly v. McCormick*, 28 *N. Y.*, 320); and the rule is now established (*People v. Brennan*, 45 *Barb.*, 344). If, therefore, the order of September 29 is indeed an order of the court, it is null and void as being *ultra vires*. 2 *Rev. Stat.* (535, 536), prescribes the powers of punishing for contempts, and shows that the only case in which the court can punish for contempt of a mere judge's order is that in

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which the order directs an attorney or other officer of the court to pay moneys, and in which no one but the disobedient officer himself can be so punished. Notwithstanding the title, therefore, and form, of the order of September 29, it, too, must be regarded and treated, if as of any effect at all, as a judge's order merely, and not as an order of the court.

IV. 1. There is no such thing, under our Code, as a direct *appeal* from a mere judge's order, whether made *ex-parte* or on notice. Unless the order is an order of the court at special term, there is no appeal from it to the general term. The Code, in section 27, and elsewhere, distinctly recognizes the fact that there is necessarily a large volume of judicial business which not only may but must be done by judges not only out of the court room, but when they are "not engaged in holding court." Instead of an appeal, section 324 expressly allows a motion to the court to set it aside and vacate it, as a means of correcting a judge's order made *ex-parte* in transacting such business. And as there is no express prescription of the method to be pursued to correct a judge's order in such business made upon notice, we are referred for it, by section 469, to the "rules and practice" which regulated that matter at the time the Code went into operation. 2. In some of the earlier cases, argued soon after the Code went into operation, it was suggested by counsel that, to correct judges' orders like those herein complained of, there should be *certiorari* to the judge who made them, to bring the proceedings into court; because it was thought that, although such orders were made by a person who chanced to be a judge of the very court from which it was proposed that the writ should issue, they were made by him as a special statutory tribunal exercising functions required to be performed by him as such, and not as a judge of the court. That suggestion went upon the theory under

which it was once the practice in the old supreme court to issue *certiorari* to the judges themselves, in order to review proceedings had before them in assessment cases and others, in which it was suggested that they had acted as commissioners and not as the court or as judges of the court. But that practice in the old supreme court was discredited by, and has never been followed by any court in this State since, the decision of the court of errors in *Striker v. Kelly* (2 *Den.*, 323), in 1845. Gardiner, President, there stigmatized it as "incongruous," for the reasons that *certiorari* cannot issue except to a subordinate court or inferior tribunal; and that the supreme court could not deal with any of its own justices as an inferior tribunal, because the constitution of the State expressly provided that they should "not hold any other office or public trust,"—which it was in that case held, that they must be considered to be doing, if any of their orders could be reviewed by the court upon *certiorari*. That prohibition is, by article VI., section 10, of the present constitution, applied to the existing supreme court; and the present supreme court itself, in 1851, in a case exactly like ours, adopted the rule laid down by the court of errors, and decided that *certiorari* will not lie from the court to review a judge's order made by one of its own justices. See *Lindsay v. Sherman* (5 *How. Pr.*, 308), which has always been followed since. 3. But, to get rid of a mere *judge's order* made whether *ex-parte* or upon notice, the proper practice is, and always has been, to move the court, upon notice, or upon an order to show cause returnable before the court, to set it aside and vacate it. (a.) That has always been the practice in the English courts (2 *Arch. Pr. K. B.*, 1 Am. ed., from 1 *Lond. ed.*, p. 278; and see 1 *Tidd Pr.*, 3 Am. ed., 511; see, also, the decisions of ABBOTT, C. J., in *Wood v. Kirk*, 1 *Chit.*, 246, and of Lord ABINGER, C. B., in *Pike v. Davis*, 6 *Mees. & W.*, 546,

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which were cases in which the judge's order moved to be set aside had been made upon the hearing after notice by summons to attend before the judge.) Where the judge's order is made a rule of court before the motion is made, the motion should be to set aside both rule of the court and the judge's order (TINDAL, C. J., in *Clement v. Weaver*, 6 *Jurist*, 62). (b.) That was the proper practice in our own courts, before the Code was adopted (1 *Burr. Pr.*, 348-350; 1 *Dunl. Pr.*, 307-309). And the books are full of reported cases in which it was enforced (2 *Wend.*, 627; 6 *Id.*, 555; 9 *Id.*, 470; 2 *Cow.*, 587; *Id.*, 463; 3 *Id.*, 73; 3 *Hill*, 455). It was the same whether the judge's order to be got rid of was made by him *ex-parte* or upon the hearing on an order to show cause returnable before him, which is equivalent to the summons to attend before the judge in England (1 *Burr. Pr.*, 350; 1 *Dunl. Pr.*, 307; 2 *Paine & D. Pr.*, 50; 1 *Johns. Cas.*, 245; 4 *Cow.*, 539). (c.) And it is always held that it is still the proper practice in our courts since the Code went into operation, whether the judge's order complained of is *ex-parte* or made after a hearing upon an order to show cause returnable before him. The latest reports of practice cases are full of examples: *e. g.*, *Follet v. Weed*, 3 *How. Pr.*, 361; *Blake v. Locy*, 6 *Id.*, 109; *Lindsay v. Sherman*, 5 *Id.*, 308; in which last case, the learned and lucid decision of Justice HAND, in 1851, is solely to that one point. The rule was exhaustively discussed, and firmly established in the proceedings in *Bank of Genesee v. Spencer*. Like *Lindsay v. Sherman*, that was a review of an order in "supplementary proceedings," similar to those in our case. An order had been made by Justice MULLET, at his chambers, but upon notice (*i. e.*, upon an order to show cause), and after hearing the parties. The party aggrieved appealed to the general term of the seventh district, which dismissed the appeal on the ground

that the proper practice was to move the court at special term to vacate and set aside the judge's order. Thereafter, the motion was so made and denied, on the ground that, in the opinion of the justice holding special term, the general term was in error, and the remedy was not by the motion, but by appeal. Upon appeal from that last order, the general term (in 1857) reversed the special term order, on the ground, as reported, that: "to get rid of an order improperly made by a judge at chambers, the proper practice is to move the court to set it aside" (Bank of Genesee v. Spencer, 15 How. Pr., 15; see, also, Boyd v. Bigelow, 14 Id., 511, decided by the Erie general term in 1857, and citing 5 Id., 308). Those decisions were made when the Code, in section 349, was as follows: "An appeal may, in like manner, and within the same time, be taken from an order made at a special term, *or by a single judge* of the same court." In 1862 that section of the Code was amended so as to read: "An appeal may, in like manner, and within the same time, be taken from an order made *at a special term by a single judge* of the same court or county, &c."—which removes any doubt as to the fact that that section is strictly within the purview of part 2, title XI, chapter IV. of the Code, in which it occurs, which is entitled: "Appeals *in* the supreme court and the superior court, and court of common pleas of the city of New York, from a single judge to the general term." It applies only to an order made by a single judge *sitting as a court*, whether actually in the court and during term and entered there immediately with the clerk, or (under § 350) out of court upon notice (being, by consent of parties or after an adjournment, under § 24, of the same force and effect as if made in court), and subsequently entered with the clerk as the order of the court. It must be and avow itself an order of the court, and be made in a proceeding pending in the

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court, and have reference to matter in which the court, as a court, can make an order. That is the only case in which an appeal can be taken immediately to the general term. If it is an order made, whether at the court room or elsewhere, in a proceeding pending before the judge merely as such, and having reference to matter in which the judge, not the court, is authorized to make the order (which is our case here), there is no immediate appeal, and the only remedy is by moving the court to set aside the improper order of the judge. It was so held in a late case [citing *Lindsay v. Sherman*, 5 *How. Pr.*, 308; *Conway v. Hitchings*, 9 *Barb.*, 378, 387; *Bank of Genesee v. Spencer*, 15 *How. Pr.*, 14]; *Union Bank of Troy v. Sargeant* (53 *Barb.*, 424). In Thayer's case, the Onondaga general term, in 1865, held the same to be the rule; and further, that if the judge's order has been entered as an order of the court, the only remedy is still by motion to the court at special term to set it aside, and by appeal to the general term from the order of the special term denying that motion—which is the English rule as shown by the cases above cited—and which is exactly the practice pursued by the appellants here (*Kelly v. Thayer*, 34 *How. Pr.*, 168). And, that section 350 of the Code does not apply to a mere *judge's order*, is shown by the facts, 1, that the orders to which it refers are "included" in "the last section" (§ 349), which has reference as is shown above, only to orders of the *court*; and, 2, that it is only an order which is and is intended to be an order of the *court* which can be entered with the clerk of the court. That section was intended only to reach the case where, after an adjournment under section 24, or by consent of parties, a term of the court, for matters pending in the court, is held, not in the court room, but at some place where the clerk is not present, and where the books of the court are not accessible. If an order is made in such a case,

the judge who presides hands it to the attorney of the party in whose favor it is—with the expectation, of course, that he will carry it to the clerk to be entered; but the expectation may be disappointed. Until entry is actually made, the order cannot be appealed from; and the object of section 350 is to secure to the adverse party his remedy of appeal, by enabling him to compel the successful party to enter the order with the clerk.

V. The papers used on appellant's motion show that they denied the alleged debt to the judgment debtor, and claimed an interest in the property adverse to him. That denial and claim entitled them to a trial of the issues by a jury, and to the continued possession and enjoyment of the property until taken from them by a judgment after verdict, on those issues—as of strict, legal, and absolute *right* (Code, § 299). By their motion to the court to strike out the judge's orders which attempted to deprive them of that right, they have pursued the proper and only remedy known to our laws or practice, and the court below had no discretion to withhold what they demanded. The order appealed from denied that remedy, and thereby unquestionably affected a *substantial* right of appellants—within the strictest definition of that term, as used in the Code (Congdon v. Dows, 28 N. Y., 128; Matter of Duff, 10 Abb. Pr. N. S., 440). It is no reply to suggest that, if the judge's orders were *ultra vires*, they were null and void and therefore inoperative to injure the appellants; and that there was no necessity for an order striking them out (Striker v. Mott, 6 Wend., 465). The case is not at all analogous to those like Bank of Genesee v. Spencer (18 N. Y., 151), where the former court of appeals dismissed an appeal from an order denying a motion to set aside an execution issued, without leave, more than five years after judgment. That was for the reason that, there, the writ on its face (unlike the order of September 29 in the case at bar), disclosed its invalidity; and that the

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sheriff, being so informed by the execution itself that it was null and void, would have no defense to an action for damages for a levy under it. It was unnecessary to set aside such an execution.

VI. The foregoing reasoning has been upon the assumption that the order of October 11 was an order in a *civil action*, though made in "supplementary proceedings. But, whatever may be the nature of "supplementary proceedings" by the judgment creditor against the judgment debtor himself (under § 292 of the Code), both of whom were parties to the action in which the judgment was recovered—it has been repeatedly held that these proceedings, so far as they are carried on by the sheriff or the judgment creditor against a *third party* (under §§ 294, 297 and 299) are *special proceedings* (Davis v. Turner, 4 How. Pr., 192; and see Holstein v. Rice, 15 Abb. Pr., 308). And, if the definitions of a "civil action" and "special proceedings" furnished by the Code itself are of any avail, it is difficult to see how there can be any difficulty about classifying them. "§ 2. An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, &c." And section 127 directs that "civil actions in the courts of record of this State *shall* be commenced by the service of a summons." But the proceedings by the sheriff in this case, against these appellants, were certainly not by a party to any action against another party to that action—they were before a judge merely, and not in any court—they were very far from being ordinary proceedings—and they were not commenced by the service of a summons on appellants. They have, therefore, none of the characteristics of an action, and must be classified under section 3, which declares that "every other remedy is a special proceeding." The act of 1854 (ch. 270) expressly authorizes an ap-

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peal to the general term from any order of the special term is a special proceeding in the court. *Amidon v. Wolcott* (15 *Abb. Pr.*, 314, a general term decision of the supreme court in the first district, in 1860), is directly to the point that, though the proceedings had been previously before the judge merely, the motion to the court to vacate and set aside his orders, brought the proceedings into the court. Appellants were, therefore, entitled under the statute to have their appeal from the order of October 11 (which was an order of the court at special term) entertained by the general term, whether that order affected a substantial right or not.

VII. The respondents do not better their case by the suggestion that the orders of May 9 and September 29 may be considered to have been made, not in what the Code calls "proceedings supplementary to execution," but to assist the sheriff in the prosecution of his rights and duties under the attachment, for under the attachment, as well as under the execution, the only proceeding which can be had to determine the claims of third parties to a debt which has been attached, is an action, and that whether the proceeding is instituted by the sheriff or by plaintiffs (*Code*, §§ 232-243). "All that the sheriff could do would be to sue them for the debt" (*Lyman v. Cartwright*, 3 *E. D. Smith*, 117). And, under the circumstances of this case, the neglect of a third party to state his claim to an interest in the property at the time the sheriff calls on him for a certificate, is no estoppel to an assertion of it afterwards. He may be held liable in a proper action for *damages*, suffered by plaintiff by reason of his reliance on the certificate—but neither the judge nor the court has any power, in this proceeding, to determine the measure, or to enforce the payment of damages, or to decide whether any have been suffered.

Hammond & Pomeroy, for respondents.

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BY THE COURT.—PECKHAM, J.—It is insisted that this order is not appealable, but that the appeal should have been taken from the other orders, if erroneous, instead of attempting to set them aside, upon motion to the court.

The orders sought to be set aside were made in a sort of supplementary proceedings against defendant, Pugsley, as a judgment debtor. They were made before a judge out of court, and resulted in the order of September 29, peremptorily requiring the officers of the Sixth National Bank to pay this one thousand and sixty-two dollars and eighty-seven cents to the sheriff having the execution against Pugsley, "within twenty-four hours after the service of a copy of this order, or that they be committed as for a contempt, until the said order be complied with." Both of these orders seem to be proceedings with a view to punish said defaulting bank as for a contempt in not paying said money, and the last one orders that all of the officers be sent to jail as for contempt, there to remain until they pay.

As these orders were made by a judge out of court, it seems to be regular practice to move to set them aside, if erroneous, before the court. The counsel for the Sixth National Bank has cited numerous cases to that effect.

True, the Code has provided that "for the purpose of an appeal, any party affected by such order, may require it to be entered with the clerk, and it shall be entered accordingly" (*Code*, as amended in 1870, § 350).*

But this does not deny the other remedy. It does not assume to deprive the party aggrieved, of his right to make a motion to the court to set aside the order of a judge, made out of court.

* The amendment of 1870 does not affect this point, but relates only to staying proceedings.

This order then, is appealable.

Is it right upon the merits? I think not, upon the grounds: 1. The Sixth National Bank had denied, and under oath, that it owed anything to Pugsley, the judgment debtor:—in the language of the Code, had denied “the debt.” In such case the Code declares that “such interest or debt shall be recoverable only in an action against such person or corporation by the receiver” (*Code*, as amended in 1849, § 299). When the bank denied owing the alleged debt to the judgment debtor, the judge had no legal right to proceed to examine in that summary way whether it did owe such debt or not. He had no authority, no right whatever then, to make any such determination. The law had provided another remedy, by action by a receiver, where the rights of the parties could be determined in the usual course of a suit at law. And see *Rodman v. Henry*, 17 *N. Y.*, 484, and cases cited.

2. These orders required the officers of the bank to pay or be sent to jail, as for contempt, and there remain until they paid.

It is difficult to believe that the legislature has intended to revive, in its most offensive form, this condemned remedy of imprisonment for debt.

We cannot believe, and cannot adjudge, that the legislature intended to revive this odious mode of collecting debts, unless it is plainly so declared.

True, the Code provides that “the judge may order any property of the judgment debtor in the hands either of himself or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment” (§ 297).

There is another provision, that if “any person, party, or witness, disobey an order of a judge . . . duly served, such person . . . may be punished by the judge as for contempt”; but . . . “in case of inability to perform the act required, or to endure the imprison-

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ment," he may be discharged "by the court or judge committing him, or the court in which the judgment was rendered, on such terms as may be just" (§ 302).

To hold that this authority extends to the collection, by these summary proceedings, of an ordinary debt due to the judgment debtor, invests a judge with a justly dreaded power over the liberty of an embarrassed or insolvent debtor. A party in extensive business, with many debts due to him, has only to allow a judgment to be recovered against him, and he may collect his desperate debts by this severe machinery.

He may send the debtor to jail, and then he may discharge him, according to the sense of justice the judge may entertain.

Inability to pay is thus made punishable with imprisonment—longer or shorter, depending upon the length of notice for discharge that the imprisoned debtor must give, the ability to reach the case in its regular order of business, the time the judge may hold the case under consideration before deciding it, and the sense of justice the judge may entertain, as to the propriety of discharging the debtor:—a harsh remedy for this age.

It is not necessary by any provision of the Code, that the debtor should be able to pay, to justify an order by the judge requiring him to do so. It is sufficient that he owes a debt to the judgment debtor. The judge may then not only order him to pay it, but commit him to jail for not doing so. Simple inability to pay, is not then ground for a discharge—otherwise the act would have so declared—but if utterly unable to pay, he can be then discharged only upon such terms, as, to the judge, may seem just. First send him to jail, and then let him get out by due process of law—always provided that he can comply with such terms as the judge deems just.

If these provisions as to "*property* of the judgment

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debtor in the hands of himself or any other person, or *due* to the judgment debtor" in section 297, be confined to property other than debts, choses in action, then these proceedings are without authority. This would give authority to the judge to order a person who had possession of goods, or of specific money belonging to the judgment debtor, or as the statute says, due to him, to deliver it over to the sheriff, to be applied to the satisfaction of the judgment. It not being denied that the property did in fact belong to the judgment debtor, the refusal to deliver it over as ordered, would be a willful contempt of the judge's order.

It is a very different principle to apply this doctrine of contempt to the collection of debts. The principle of imprisonment for debt was abolished some forty years ago in this State, deliberately, and we are not disposed to revive it by uncertain implications.

Therefore, the order appealed from must be reversed, and the motion to set aside the orders of May 12, and September 29, is granted, with costs.

It was so ordered.

THE PEOPLE, *on the relation of* CORNELL, *against*
NORTON.

Supreme Court, First District ; Special Term, August,
1871.

MANDAMUS AGAINST MUNICIPAL CORPORATION.—
REQUISITES OF AFFIDAVIT.—APPROPRIATION
OF MONEY.

On an application for a mandamus against a municipal corporation to compel payment of a claim which has been duly certified, verified,

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audited and allowed, and the correctness and justness of the items of which are positively sworn to by the relator,—general allegations on information and belief, that the bill is grossly extravagant, are not sufficient to justify the court in refusing a mandamus.

General allegations on information and belief, to the effect that the appropriation had been exhausted only by illegal payments,—*held*, in this case sufficiently negated by the positive affidavit of the comptroller to the contrary.

Under a statute requiring the comptroller of New York city to raise and pay to the commissioners of the county court house a certain sum to be expended under their direction for the completion of the court house (*Laws of 1871*, ch. 583, § 7),—*Held*, that a mandamus might issue, to compel the commissioners to make requisition for payment of, and the comptroller to pay, outstanding claims for work previously done on the building.

Motion for a mandamus.

Three several motions were made on behalf of the relator, John B. Cornell, surviving partner of the firm of J. B. & W. W. Cornell, on three several notices of motion, each for a peremptory mandamus, one against Richard B. Connolly, comptroller of the city of New York, and two against Michael Norton and others, the commissioners of the new county court house, in the city of New York.

These motions were, however, made on one and the same affidavit, and were heard together, and treated as one motion. The object of all the motions were the same, viz: That the relator might obtain payment of the balance of thirty-four thousand seven hundred and twenty-five dollars and forty-eight cents, due on a bill of iron work put into the new county court house, by the firm of J. B. & W. W. Cornell, during the years 1868 and 1869.

The first motion was to compel the commissioners of the court house, by mandamus, to issue a requisition upon the comptroller for the payment by the comptroller to the relator of the amount due on the bill.

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The second motion was to compel the commissioners, by mandamus, themselves to pay to the relator the amount due on the bill out of a sum of money paid over to their credit by the comptroller, upon their requisition, under the provisions of the act of April 19, 1871.

The third motion was to compel the comptroller, by mandamus, to pay the relator the amount due upon the bill, in the manner and form as he is by law required to do.

The facts appearing by the relator's affidavit, and by the affidavits in opposition, are given in the opinion.

Edmund Randolph Robinson and *Abraham R. Lawrence*, for the relator.

First division of the argument.—The right to a mandamus directly against the relator.

I. The bill of the relator was a legal county charge, and was duly audited by the supervisors, and by the county auditor, and was approved by the comptroller, and a partial payment made by him thereon. Every step necessary to authenticate county charges had been taken in regard to this bill prior to the partial payment made by the comptroller, and there can be no dispute as to the legality of the relator's claim against the county of New York (*Supervisors of Onondaga v. Briggs*, 2 *Den.*, 26 ; *People v. Stout*, 23 *Barb.*, 338, 339 ; 2 *Laws of 1857*, 286, § 6). All the appropriations for the construction of the court house, made prior to 1870, were, by the express terms of the appropriation acts, made subject to the direction of the board of supervisors, "to be paid by the comptroller on bills audited and allowed by the board of supervisors." The board of supervisors audited and allowed the bill in question on July 5, 1869, and directed the comptroller to pay it.

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II. It follows from the above point, that the relator, at the time the comptroller made the partial payment on account of the bill aforesaid, and thereby approved the same, was entitled to a mandamus against the comptroller, to compel him to draw his warrant on the county treasurer for the full amount of such bill, providing the comptroller had, or could have had, funds applicable to the payment thereof (People *v.* Stout, 22 *Barb.*, 338; People *v.* Haws, 34 *Id.*, 69; People *ex rel.* Morris *v.* Edmonds, 15 *Id.*, 529; People *v.* Opdyke, 40 *Id.*, 306; People *v.* Connolly, 4 *Abb. Pr. N. S.*, 375; People *v.* Commissioners of Records, 11 *Abb. Pr.*, 114; People *v.* Commissioners of Records, 2 *Keyes*, 202; Huff *v.* Knapp, 5 *N. Y.* [1 *Seld.*], 75; Adsit *v.* Brady, 4 *Hill*, 620).

III. No action at law could be maintained against the county to recover the amount of the bill (Brady *v.* Supervisors of New York, 2 *Sandf.*, 460; S. C., affirmed, 10 *N. Y.* [6 *Seld.*], 260; Chase *v.* Supervisors Saratoga, 33 *Barb.*, 603; Boyce *v.* Supervisors Cayuga, 20 *Id.*, 294). In the case of Brady *v.* Board of Supervisors, above cited, the superior court held that no action for the recovery of a county charge can be maintained against a county or the board of supervisors. Also, that suits against a county can only be brought for such causes of action or controversies as cannot be settled and adjusted by the board of supervisors, in the exercise of their ordinary powers, such as torts, malfeasances of county officers, and the like (2 *Sandf.*, 460). The court of appeals affirmed the decision of the superior court, and it has ever since been regarded as settling the law in this State (10 *N. Y.* [6 *Seld.*], 260). In the case at bar the claim of Cornell was a matter of account. The prices charged by him were specified in the contract between him and the county, and the audit and allowance of his bill was properly a subject of cognizance and set-

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tlement by the board of supervisors. In view of this decision, the allegation of Commissioner Coman, made on information and belief, that the relator's bill is grossly extravagant, and had not been audited by the commissioners of the court house, is scandalous and impertinent, and cannot be regarded.

IV. The supervisors having performed their duty in auditing the bill in question, the auditor having performed his duty in examining and allowing the voucher or bill; the comptroller having approved of the voucher or bill by making a partial payment thereon, and by promising to pay the balance, it thereupon became his duty to pay the same, or to draw his warrant for that purpose (*People ex rel. Kelly v. Haws*, 12 *Abb. Pr.*, 192). In the case just cited, Mr. Justice SUTHERLAND held, that under the provisions of section 6 of the act of 1857, entitled "An Act relating to the board of supervisors, &c., of New York" (2 *Laws of* 1857, 285, ch. 590), the comptroller had no power to examine and disallow county charges which had been already examined and allowed by the board of supervisors, but that his power in that respect was limited to the examination of the vouchers. In this case the comptroller approved of the voucher by making a payment thereon and promising to pay the balance (See, also, *People ex rel. Hall v. Supervisors N. Y.*, 32 *N. Y.*, 473).

V. The next question then is, whether anything has occurred since the audit of this bill in 1869, which takes away or in any manner affects the right of the relator still to have a mandamus against the comptroller, commanding him to pay the balance due upon the bills set forth as a part of the moving papers herein. (*a.*) It appears by the affidavit of J. B. Cornell, the relator, that from the year 1862 to and including the year 1866, large sums of money, amounting to more than the sum of two million six hundred thousand dollars were raised under acts of the legislature of the

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State of New York, which sums were directed to be paid by the comptroller on bills for work and materials furnished for the court house, in the city of New York, audited and allowed by the board of supervisors of the county of New York. For convenience of reference, we cite the acts referred to in his affidavit: *Laws of 1862*, 335; *Laws of 1864*, 497; *Laws of 1865*, 1253; 2 *Laws of 1866*, 1893. And it further appears, that in the year 1867, the board of supervisors were directed to raise the further sum of eight hundred thousand dollars for the same purpose (2 *Laws of 1867*, 1994). (b.) In the tax levy of 1868, the legislature directed that, "for the completion, fitting up and furnishing of the new court house in the said county, now near completion, the comptroller of the city of New York is hereby authorized and directed to raise the necessary money, not exceeding eight hundred thousand dollars, on the stock of the said county, in the usual form, payable within twenty years, in five annual installments, said stock to bear interest at a rate not exceeding seven per cent. per annum. The said stock shall be designated and known as the New York county court house stock, No. 2, and the issuing of the same shall conform so far as applicable to the provisions of this act to chapter 167, *Laws of 1862*, and the act, chapter 242, *Laws of 1864*, relative to said court house. The money so raised shall be paid by the comptroller on bills audited and allowed by the board of supervisors of said county" (*Laws of 1868*, 2031, ch. 254, § 1). In the tax levy of 1869, the legislature directed that, "Sec. 4. For the completion, fitting up and furnishing of the new court house in said county, now near completion, the comptroller of the city of New York is hereby authorized and directed to raise the necessary money, not exceeding six hundred thousand dollars, on the stock of the said county, in the usual form, payable within twenty years, in five annual installments, said stock to

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bear interest at a rate not exceeding seven per cent. per annum. The said stock shall be designated and known as the 'New York county court house stock, No. 3,' and the issuing of the same shall conform so far as applicable to the provisions of this act, to chapter 167 Laws of 1864, relative to said court house. The money so raised shall be paid by the comptroller on bills audited and allowed by the board of supervisors of said county" (2 *Laws of* 1869, 2116, ch. 875, § 4). It is worthy of remark in this connection, as bearing upon the right of the relator to a mandamus against the comptroller, that the acts of 1868 and 1869, above referred to, made it specifically the duty of the comptroller to pay out the moneys thereby authorized and directed to be raised, "on bills audited and allowed by the board of supervisors of said county," thus giving him no discretion in the matter, and rendering it unnecessary that the bills should be audited by the county auditor or approved by the comptroller. As such audit and approval were, however, obtained in this case, it is, perhaps, immaterial whether the above is the correct construction of these statutes. In other words, the relator's bill has not only been audited and allowed by the supervisors, as these acts require, but it has also been examined, allowed and approved by the act of 1857 (2 *Laws of* 1857, 285). Thus it appears that, in 1869, the comptroller had, or had the means of having, six hundred thousand dollars in his hands, out of which the bill of the relator was payable, and out of which it could have been paid in full (See *People v. Stout*, 23 *Barb.*, 338, and other cases, *supra*). It will be borne in mind that the relator's bill was audited July 8, 1869. No payment was made thereon until December 6, 1869. Why this delay occurred in making the partial payment, we are not informed, but the fact is clear that the comptroller cannot say, that between the audit of the bill and the partial payment,

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he had not sufficient funds with which to meet the whole bill. If the comptroller has exhausted this appropriation of six hundred thousand dollars, it is his duty, and the onus is on him, to make that fact appear. The presumption is that he has not exhausted it, and until that fact is shown beyond dispute, there can be no answer to the relator's application for a mandamus. (c.) It is specifically alleged in the relator's affidavit, that the time of the auditing and allowance of his bill, on July 5, 1869, and at the time of demand for payment made on the comptroller, there was remaining in the hands of the said comptroller of the said above-mentioned appropriations, or some of them, applicable to the payment of said bill, a sum of money far more than sufficient to pay the said bill in full. This allegation is not denied or answered in the comptroller's affidavit, in any shape, form or manner. (d.) Again, it is specifically alleged in the relator's affidavit, that in the spring of 1870, large sums of money were paid by the comptroller to Mr. Garvey for work claimed to have been done by him on the court house long subsequent to the audit of the relator's bill, and prior to the passage of the act of 1870, by which the direction and control of the court house was transferred to the commissioners. These payments to Garvey are set forth in detail, item by item. This allegation is not denied or answered in the comptroller's affidavits in any shape, form or manner. (e.) Again, it is alleged that the payments to Garvey were illegal and fraudulent, "that they were largely in excess of the amounts to which the said Garvey was entitled for the labor and materials furnished by him to said court house, and that bills for the amounts of said payments, or some of them, were not presented, audited, and allowed in the manner required by law, and that said payments, or some of them, were made by the said comptroller without the proper vouchers therefor and

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in violation of law." All that the comptroller answers to these specific allegations is that "he has no funds legally applicable to the payment of the claims set forth in said proceedings," and "that all the moneys which have been authorized by the legislature to be raised from time to time for the purposes of the new county court house have been expended in accordance with the statutes made therein, save only funds remaining in the county treasury authorized and directed to be raised by the legislature of 1871, and that no payments for or on account of said court house have been made by him, unless in accordance with law, as he is advised." (*f.*) We earnestly maintain that this does not amount to a denial of the specific allegation contained in the relator's affidavit. The only fact alleged in the comptroller's affidavit is the actual exhaustion at the present time of all the appropriation prior to 1871, out of which the relator was entitled to be paid. The other allegations are mere allegations of conclusions of law, and the specific facts stated by the relator showing that the previous appropriations were not legally or in contemplation of law exhausted, stand admitted. The circumstances that these facts are stated by the relator upon information and belief do not in any way weaken the force of the admission made by the comptroller. He has not denied them, even upon information and belief (*Union Bank v. Mott*, 9 *Abb. Pr.*, 106).

VI. We therefore submit that the relator having been clearly entitled to payment by the comptroller, out of the appropriations above mentioned, and having fully complied with all the prerequisites to such payment, it is no excuse for the comptroller to say, that since the relator's bill was audited, and demand of payment made, he has exhausted this fund, when he does not show that he has exhausted it in the payment of bills to which such fund was legitimately applicable,

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and when the relator does show, without denial, that a large portion of it has been misappropriated, by the payment of illegal and fraudulent claims. To the extent that legal payments are not shown, or to the extent that illegal payments have been made, it is as if the money were in the treasury, so far as our application is concerned. The relator, with a bill, admitted to be correct, and regularly audited, had a vested right to be paid out of these appropriations, or at all events to be paid out of these appropriations, as far as they would go, *pro rata* with others, whose bills had been audited at the same time or subsequent to his own. The comptroller had no right to exclude him and pay others in full, whose bills were either not audited at all, or were audited subsequent to his. To pay Garvey's claims out of the balance of the appropriations of 1869, and of previous appropriations, which the comptroller had in his hands, was a fraud on the relator, whose work was performed, and whose bill was audited, long before Garvey did any work. Even if the "Garvey" bills were *bona fide*, regularly audited for work duly done, the comptroller had no right to do this. *A fortiori*, if the "Garvey" bills were fraudulent, not duly audited, and paid collusively, in violation of law, as is alleged in the affidavit. It is like the case of an executor, to whom a claim has been regularly presented, and by whom it is allowed, and who afterwards undertakes to plunder or squander the estate, or even to pay out all of it to other creditors. Would no assets be an answer to the claimant thus excluded when he comes for his pay? Besides, it is settled: Mandamus will lie, notwithstanding the act has already been performed in behalf of another. It is no ground for refusing mandamus to the sheriff, requiring him to execute a deed, that he has already executed one to another person, who has conveyed to a *bona fide* purchaser. The sheriff must do his duty (People *v.* Flem-

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ing, 2 *N. Y.* [2 *Comst.*], 484). So mandamus will lie to compel county commissioners to certify that the petitioner had a majority of the votes, although another had been declared to the county treasurer, and is in possession of the office (*Ellis v. Commissioners*, 2 *Gray [Mass.]*, 370). So to put a minister of any religious sect in possession of the pulpit to which he is entitled, notwithstanding such pulpit is occupied by another person (*People v. Steele*, 2 *Barb.*, 398). EDMONDS, J., says: "It would otherwise make the wrong done a complete barrier of itself to all adequate remedy for it." The case of *People v. Stout*, county treasurer of New York, (23 *Barb.*, 338), is controlling authority on this point. In the case just cited, where the county treasurer sought to excuse himself for not paying a county charge out of a specific sum which had been raised for county contingencies, by showing that said sum had been spent in paying claims against the city of New York, the court held that the fact was no excuse, and directed that a peremptory mandamus issue (*Per DAVIES, J.*, pp. 348, 349).

VII. If, however, the court should be of the opinion that the "exhaustion" of the appropriation of 1869 and of the previous appropriations, even though an illegal and fraudulent exhaustion, is an answer, so far as these appropriations are concerned, to our application for a peremptory mandamus against the comptroller to pay the relator the amount due him, we submit that:

1. The appropriations of 1870 and 1871 are also applicable to the payment of the amount due on the relator's bill, and the bill should be paid out of the balance of the appropriation of 1871, which it is admitted has not been exhausted. (a.) The act of the legislature of this State, commonly known as the county tax levy of 1870, contains the following provision: "SEC. 11. To provide for the final completion of the new county court house in New York, the mayor of said city is hereby

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authorized and empowered to appoint four commissioners, and upon the appointment of said commissioners, all powers of the board of supervisors of the county of New York over the erection of said court house shall cease. The said commissioners shall have the power to expend, and shall complete said court house for a sum not exceeding six hundred thousand dollars, which amount the comptroller of the City of New York is hereby authorized and directed to raise on the stock of the county of New York—said stock to be in the usual form, and payable within twenty-five years from the passage of this act, and bear interest at a rate not exceeding seven per cent. per annum. The said stock shall be designed as the 'New York court house stock, No. 4,' and the issuing of the same shall conform, so far as applicable to the provisions of this act, to chapter 177, Laws of 1864, relative to said court house. The money so raised shall be paid by the comptroller, on vouchers approved by the commissioners herein authorized, and to be filed in his office. The board of supervisors of the county of New York are hereby authorized and directed to order and cause to be raised, by tax upon the estates by law subject to taxation within the city and county of New York, an amount sufficient in each year to pay the interest on the stock herein authorized, and that issued by previous authority, and also an amount sufficient to pay and redeem the stock hereby and heretofore authorized for the aforesaid purposes at its maturity" (1 *Laws of* 1870, 880, § 11, ch. 382). And by the act of 1871, ch. 583, the legislature further directed that: "Sec. 7. For the completion of the New York county court house, the sum of seven hundred and fifty thousand dollars is hereby authorized to be appropriated, to be expended under the direction and supervision of the commissioners appointed under the provisions of section 11, chapter 382, of the laws of 1870, to provide for the

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completion of the new county court house in the city of New York. And the comptroller of the city shall, on requisition of the commissioners of said county court house, pay over to their credit such sum or sums as they may from time to time deem necessary for said purpose. The comptroller of the city of New York is hereby authorized and directed to raise said amount on the stock of the county of New York ; said stock shall be in the usual form, and payable within twenty-five years from its issue ; said stock shall be designed as 'New York county court house stock, No. 5,' and the issuing of the same shall conform, so far as applicable to the provisions of this act, to chapter 177 of the Laws of 1864, relative to said court house. The board of supervisors of the county of New York are hereby authorized and directed to order and cause to be raised, by tax upon the estates by law subject to taxation, within the city and county of New York, an amount sufficient in each year to pay the interest on such stock, and also an amount sufficient to pay and redeem said stock at its maturity." (b.) It appears, then, that the appropriations of 1868 and 1869 were for the "completion, fitting up, and furnishing of the new court house," and the appropriations of 1870 and 1871 were also "for the completion of the new court house." There is, therefore, no difference in these appropriations, and the work of the relator having been done toward the completion of the court house, comes within the scope of all of them. So far as the purpose and object of these appropriations are concerned, they are substantially the same as those of the previous appropriations, which are admitted to be applicable. The position may, however, be taken that the appropriations of 1870 and 1871 cannot be applied to the payment of bills audited for work done in 1868 and 1869, towards the completion of the court house, but are

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only applicable to work done after, and ordered after, these appropriations were made, and after the appointment of the commissioners. This position will not bear examination. The legislature must be presumed to have been aware of the condition of things at the time these appropriations were made, and, therefore: It cannot be supposed that the legislature intended that new work should be ordered and paid out of these appropriations, while bills, duly audited, for work already done, were to be left unpaid and unprovided for. An appropriation to "complete" the court house is an appropriation, in the first place, to pay the bills for work already done, and which previous appropriations for the same purpose have not been adequate to pay; and, in the next place, to pay, as far as the appropriation will go, for such new work as may be adequate to finish the structure in question. It cannot be supposed that the legislature intended, in making appropriations to complete the building, to leave unpaid and unprovided for bills contracted by competent authority, and justly due for work done towards the completion of the building. The court will not construe the act so as to make it in effect "An act to repudiate the obligations of the county of New York." The Cornells' contract is a continuing contract, and they have done work under it for a series of years, and there is still work to do under it. If the position taken were sound, the Cornells could only get paid out of the appropriation of 1868 for work done subsequently to the date of that appropriation, and out of the appropriation of 1869 for work done subsequently to the date of that appropriation, and so with respect to the appropriations of 1870 and 1871, so that for work done previously to the date of either of these appropriations the relator will be without remedy, if previous appropriations are exhausted. The commissioners may commit any extravagances for new work, but must leave work already

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done unpaid for. No contractor on the face of the earth could go on and complete his contract if the work already done was not only left unpaid for but unprovided for. The court will not give a construction to the language of the legislature which leads to this absurd and monstrous result, unless compelled to do so. (c.) This point has, however, been determined by an express adjudication in our favor. We allude to the case of People *ex rel.* Downing *v.* Rushmore, Supervisor of the town of Mamaroneck, which was decided by the general term of the second department in January, 1871. That case arose on the following state of facts: In 1868 the legislature passed an act to regulate, &c., the Westchester, &c., turnpike road. The road passed through several towns in the county of Westchester, and the work was to be done under the supervision of certain commissioners, who were appointed by the act. It was also provided that the supervisors of the towns aforesaid should be authorized and required to borrow on the credit of each town, by the issue of bonds of each of said towns, such sums of money as might be required to perform such work within the limits of each town respectively, according to the distance of such highway therein, but the amount so borrowed was not to exceed in the aggregate the sum of ten thousand dollars per mile. It was made the duty of the supervisor of each town, on the requisition of the commissioners, to pay the amount due from said town by the issuing of bonds, &c. (2 *Laws of* 1868, p. 1118-19, &c.). The commissioners proceeded with the work, and expended or incurred a liability for a greater sum than ten thousand dollars per mile, in each town; and accordingly an act was passed in 1870, the first section of which is as follows:—"Sec. 1. The supervisors of the towns of West Farms, Westchester, Eastchester, Pelham, New Rochelle, Mamaroneck, and Rye, are hereby authorized, directed and required to

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borrow on the credit of their respective towns, by the issue of bonds of each of said towns, the further sum of ten thousand dollars per mile, in addition to the amount appropriated by chapter 549 of the *Laws of* 1868, for the purpose of completing the Westchester Turnpike and Boston post-road, in the manner provided for in said act" (2 *Laws of* 1870, p. 1460). The supplementary act contained provisions virtually similar to those of the original act in regard to the duty of the supervisor to issue the bonds of his town in payment for the work. A requisition was drawn upon the respondent Rushmore, as supervisor of Mamaroneck, requiring him to issue bonds of said town, in the sum of four thousand five hundred dollars, and it appeared upon the face of said requisition, that all of the work for which said amount was claimed to be due had been performed and completed prior to the passage of the act of 1870. On that ground, among others, he refused to comply with the requisition of the commissioners. A motion was made for a peremptory mandamus to compel him to issue the bonds, and he resisted the motion on the ground that he was only required to issue bonds to pay for work which had been performed for "the purpose of completing" the work; that it appeared that all the work for which pay was sought had been performed before the passage of the supplementary statute, and that that statute referred to future work, and not to such as had already been done. This question was discussed both by counsel for relator and respondent, and a mandamus was directed to be issued by the special term, Mr. Justice PRATT presiding. On appeal to the general term, the same question was discussed by both counsel, and the general term (present, BARNARD, GILBERT and TAPPAN, JJ.), affirmed the order below. No appeal was taken to the court of appeals. (*d.*) Besides, it appears that the comptroller and the commissioners have already

practically given the very construction to the language of these appropriations which we claim to be correct. The moving papers show that they have actually paid out of these appropriations alleged claims to a large amount for work ordered or done prior to the time these appropriations were made, and prior to the appointment of the commissioners. And the comptroller expressly promised the relator to pay the amount due on his bill out of the appropriation of 1870. How then can it be claimed that the payment of the amount due on his bill does not come within the scope and object of these appropriations? Why were these promises given? Because they were given in accordance with the true, practical, common sense construction of the appropriation acts—the construction which any man of ordinary capacity would give to the language employed, and which has already been given by the courts in a similar case. They show that the construction now contended for is not the plain, natural one, and is not urged sincerely or in good faith, but is merely an afterthought, devised for the purpose of this dilatory and vexatious defense. If this construction is now claimed by the comptroller, he not only stultifies himself but places himself in this dilemma. He cannot claim on the grounds above stated that Cornell's bill is not entitled to be paid out of the unexhausted appropriation of 1871, without confessing that such of the payments made to Garvey as were made out of the appropriations of 1870, were on these grounds alone (without reference to their admitted extortionate and fraudulent character) misapplications of that appropriation. If on the other hand he claims the "Garvey" payments to have been legally made, he concedes that Cornell's is payable out of the appropriation of 1871. (e.) Section 4 of the act of 1870 does not militate against the construction claimed for the act of 1870, and more particularly for the act of 1871. That section is as fol-

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lows:—"Sec. 4. All liabilities against the county of New York, incurred previous to the passage of this act, shall be audited by the mayor, comptroller, and present president of the board of supervisors, and the amounts which are found to be due shall be provided for by the issue of revenue bonds of the county of New York, payable during the year 1871, and the board of supervisors shall include in the ordinance levying the taxes for the year 1871 an amount sufficient to pay said bonds and the interest thereon. Such claims shall be paid by the comptroller to the party or parties entitled to receive the same, upon the certificate of the officers named herein" (1 *Laws of* 1870, 880, ch. 382, § 4). This section clearly does not apply to claims for which special appropriations had been made, and which had already been duly audited, so as to entitle them to payment out of those appropriations.

2. No other vouchers are necessary to entitle the relator to payment out of the unexhausted appropriation of 1871 in addition to those which are annexed to the moving papers, and the relator is therefore entitled to a mandamus directly against the comptroller to compel payment out of that appropriation. The direction that the comptroller should pay over, on requisition of the commissioners, contained in the act of 1871, &c., refer only to future obligations. These statutes do not mean that where a bill had been regularly audited, examined and allowed, and thus become a legal debt of the county, the commissioners should also go through with the formality of approving of the claim, or drawing a requisition therefor. Such a construction would be opposed to the common sense view of the subject, and would amount to charging the legislature with the design of requiring unnecessary circuitry of action in regard to claims already decided by the appropriate tribunal, *i. e.*, the board of supervisors, to be legal and valid.

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VIII. With respect, therefore, to the unexhausted appropriation of 1871, as well as with respect to the illegally and fraudulently misapplied appropriations of previous years, the relator is entitled to a mandamus directly against the comptroller, commanding him to pay the relator the amount due on his bill.

Division second of the argument.—As to the relator's right to a mandamus against the commissioners.

IX. If this court should hold, in opposition to the views submitted by the relator under the first division of the argument, that the illegal and fraudulent exhaustion of the appropriations, prior to 1871, deprives him of his remedy directly against the comptroller, and also that with respect to the unexhausted appropriation of 1871, the requisition of the commissioners is a necessary preliminary voucher to entitle him to such remedy, we submit that: The relator was legally entitled to receive this voucher from the commissioners, and it was their duty to give it. He formally demanded it of them, but has not been able to obtain it, and thereupon made the motion for a mandamus, to compel them to give it. If, therefore, this voucher was necessary as a preliminary to payment by the comptroller, it is the duty of the court to grant this motion against the commissioners, and it is also the duty of the court to grant the further motion against the comptroller, and to compel him, on receiving such requisition, to take the necessary steps directed by the act of 1871, to raise the money called for by the requisition, and with it to pay the relator.

X. Neither the commissioners nor the comptroller take the objection in their affidavits that the appropriation of 1871 is not applicable. That objection, if taken on this argument, has been already sufficiently answered under point 7.

XI. The principal objection is that taken by the
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commissioners, that it was not their duty to give the requisition until after the bill had been reaudited by them. To this we say: (1.) The only difference between the appropriations of 1870 and 1871 and the previous appropriations is, that the previous appropriations were made by the legislature, subject to the direction of the board of supervisors, while these appropriations are made subject to the direction of certain commissioners, who are appointed in the place and stead of the board of supervisors to superintend the construction and completion of the court house. (2.) The effect of the act is therefore merely to make these commissioners successors in office of the old board of supervisors, so far as this particular work is concerned. The audit and allowance by their predecessors in office is as binding upon them as the audit and allowance by one board of supervisors would be upon a board subsequently elected, especially when no pretense is made that the bill is incorrect, or that the audit and allowance were fraudulent or improperly made. (3.) And it is settled that the audit and allowance of accounts against the county by the board of supervisors, who had the authority to make such audit and allowance, is a judicial determination conclusive upon themselves and upon their successors in office. (Supervisors of Chenango *v.* Birdsall, 4 *Wend.*, 453; Supervisors of Onondaga *v.* Briggs, 2 *Den.*, 26, 39; People *v.* Supervisors of Schenectady, 35 *Barb.*, 408; People *v.* Stout, 23 *Barb.*, 344; People *v.* Ames, 19 *How. Pr.*, 551; Huff *v.* Knapp, 1 *Seld.*, 65; People *v.* Champion, 16 *Johns.*, 61; People *v.* Collins, 19 *Wend.*, 56). It is held, that if a writ of mandamus is granted against a board of supervisors, and their term of office expires, it will devolve upon their successors to obey the writ (People *v.* Champion, *supra*; People *v.* Collins, *supra*). Now in this case the commissioners

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having succeeded to the powers of the board of supervisors, in respect to the erection and completion of the court house; they are just as much bound by the action of the supervisors of 1869 as the supervisors of 1870 or 1871 would have been, if that board had still retained control of the work of building the court house.

XII. No reaudit is necessary.

XIII. The only objection to the order remaining to be considered is that of the comptroller. He raises the objection that with respect to him the mandamus is premature, that however clear may be the right of the relator to be paid out of the appropriation of 1871, this court has no power to direct payment on the present application; that is to say, that to obtain relief the relator must first take a proceeding by mandamus against the commissioners to obtain their requisition, and bring that proceeding to a successful termination; secondly, when that is done and not before, take a second proceeding by mandamus against the comptroller to compel him to raise the money which the act of 1871 directs him to raise, and bring that proceeding to a successful conclusion, and when that is done, and not before, he may take a third proceeding to obtain a mandamus directing the comptroller to pay.

XIV. The objection is merely technical. The comptroller admits that if the requisition is issued, the relator is entitled to be paid by him out of the appropriation of 1871. Why then should he object to a direction to that effect being incorporated in the present order? Why should he insist that we be compelled to take two further proceedings against him to compel him to discharge his duty? The court may make the order on the present motion under the alternative prayer for general relief in the motion against the comptroller, and under the authority of the following cases: *People v. Auditors of Westford*, 53 *Barb.*, 563;

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affirmed in the court of appeals; *People v. Commissioners of records*, 11 *Abb. Pr.*, 117; *People v. Haws*, 12 *Id.*, 71, 72; S. C. at general term, 34 *Barb.*, 69; S. C. in court of appeals, 2 *Keyes*, 292). The latter case decides that it is possible in the same proceeding by mandamus to establish the right and to enforce it.

XV. In conclusion, we present to the court this state of facts: (A.) The relator has a legal contract with the county of New York for the iron work upon the court house. (B.) He has honestly and fairly performed his work under the contract at the prices agreed upon on November 17, 1863, when it was executed. (C.) He earned at these prices sixty-five thousand five hundred and ninety-nine dollars and eighteen cents, and his bill for that amount was duly audited by the supervisors, examined and allowed by the auditor, and approved by the comptroller, who, on December 6, 1869, paid the relator thirty-two thousand seven hundred and ninety-nine dollars and fifty-nine cents, on account of the same. (D.) Since December 6, 1869, the relator has not received a single dollar on account of this claim, although its payment has been repeatedly promised by the comptroller. (E.) During 1869, 1870 and 1871, the sum of one million nine hundred and fifty thousand dollars has been raised for the erection and building of the court house. (F.) The relator has no right of action against the county on his contract, and is remediless unless he obtains relief on these motions.

Richard O'Gorman and W. C. Trull, for the comptroller.—I. The answer of the comptroller that he has no moneys applicable to or appropriated for the payment of the relator's claim is a perfect defense to the application for a mandamus (*People v. Tremain*, 29 *Barb.*, 96; *People v. Connelly*, 2 *Abb. Pr. N. S.*, 321; *People v. Burrows*, 27 *Barb.*, 89).

II. Even if the appropriation of six hundred thou-

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sand dollars made by the act of 1870 remained in the treasury subject to the warrant of the comptroller, still the relator would not be entitled to payment out of that fund. (a.) The clause, in the act of 1870, making the appropriation of six hundred thousand dollars, expressly provides "the money so raised shall be paid by the comptroller, on vouchers approved by the commissioners herein authorized, and to be filed in his office." There is not a pretense in the motion papers that the relator's claim, or any voucher therefor, has ever been approved by the court house commissioners. The allegation upon information and belief in the motion papers that payments have been made to other parties, out of the appropriation of 1870, by the comptroller, without proper vouchers, does not strengthen the relator's case. If such payments were made without proper vouchers they were illegally made, and in direct violation of the statute which requires vouchers and directs by whom they shall be approved. The relator's vouchers are not so approved, yet, in defiance of the statute requiring such approval, he asks the court to compel the comptroller to perform for him the very act he complains of as having been done for another.

III. The appropriations of 1870 and 1871 are neither of them applicable to the payment of the relator's claim. (a.) The act of 1870 was passed April 26, 1870 (*Laws of 1870*, ch. 382). By section 4 of that act it is provided, "All liabilities against the county of New York, incurred previous to the passage of this act, shall be audited by the mayor, comptroller, and present president of the board of supervisors," . . . and then provides for the payment of the amounts found due by the issue of revenue bonds, and directs the comptroller to make such payment upon the certificate of the mayor, comptroller, and president of the board of supervisors. The relator's bill is for work done and

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materials furnished between July 7, 1868, and May 1, 1869, and is therefore a "liability incurred previous" to the passage of the act of 1870, and clearly within the provisions of that act as to audit and payment. It is no answer to this position to say, that the relator's bill had been audited by the board of supervisors prior to the passage of the act of 1870. The statute contains no words of exception. The words used, "all liabilities," are the broadest and most comprehensive that could possibly have been selected, and plainly include the relator's claim. It was entirely competent for the legislature to require a new audit of the relator's bill, and to make special and particular provision for its payment, and it did so in plain terms by section 4 of the act of 1870. (b.) The legislature having, by section 4 of the act of 1870, made special provision for the payment of all liabilities against the county, including that to relator, it follows, upon every principle of reason and construction, that the subsequent appropriations made by the legislature, by the acts of 1870 and 1871, for the completion of the county court house, are not applicable to the payment of the relator's claim. The acts of 1870 and 1871 expressly declare that the appropriations thereby made are for the completion of the court house. The payment for work previously done on the court house, out of the appropriations of 1870 and 1871, would not advance its completion a single step. A construction of the acts of 1870 and 1871, which should render those appropriations applicable to the previous indebtedness, would not only violate the express provisions of those acts, but would also work great injustice to parties who, upon the faith of those appropriations, have furnished materials and performed work under employment of the new commissioners.

IV. The case made by the relator fails to show any duty owing to him under the act of 1871. (a.) The relator, in his motion papers, charges that, by the act of

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1871, seven hundred and fifty thousand dollars was authorized to be appropriated for the completion of the court house. It is true that the act of 1871 authorizes that sum to be appropriated, but that act does not make such appropriation, but, on the contrary, provides that the board of apportionment created by section 3 of the act (2 *Laws of* 1871, p. 1269, § 3) shall make such appropriation subject to the limitation contained in sections 1 and 2 of the act. The fact that section 7 of the act of 1871 authorizes seven hundred and fifty thousand dollars *to be* appropriated is not an appropriation of that or any other sum for the purpose named. That sum was mentioned doubtless as the maximum sum to be appropriated for the court house, Until the board of apportionment by action under section 3 of the act declared what sum should be expended on the court house there could be no appropriation whatever for that purpose. It does not appear that the board of apportionment has ever apportioned any sum for expenditure upon the court house. (b.) Whatever duty the comptroller owes under the act of 1871, he owes to the court house commissioners, not to the relator. The statute requires the comptroller to pay to the commissioners, not to the relator. He is to pay upon the requisition of the commissioners, and in such sums as they deem necessary. (c.) Before the comptroller, under the act of 1871, could, under any reasonable construction of the act, owe any duty to the relator, it should appear: 1. That the board of apportionment had appropriated and apportioned the seven hundred and fifty thousand dollars, or some portion thereof, to the completion of the court house. 2. That the commissioners of the court house had made requisition for the amount of the relator's bill, and the comptroller refused to honor the requisition. Neither of these facts appear. On the contrary, it affirmatively appears that the commissioners refuse to recognize the

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relator's claim, and that they have never made any requisition on the comptroller for its payment.

Ambrose Monell, for the commissioners.—I. The comptroller should not be compelled to pay the relator the amount of his bill. 1. The commissioners herein derive their existence from the county tax levy of 1870. *Laws of 1870*, p. 880, ch. 382, § 11. 2. Prior to this act the entire construction of the county court house had been under the supervision and direction of the board of supervisors of the county of New York, and by the act in question it will be seen that upon the appointment of the commissioners all powers of the board of supervisors over the erection of said court house should cease. The comptroller of the city of New York was also by said act authorized to raise the sum of six hundred thousand dollars, which was to be used by the commissioners in the completion of the court house. The money so raised was to be under the control of the comptroller, and was to be paid by him on vouchers approved by the commissioners. 4. The commissioners were appointed in the latter part of the year 1870, and immediately thereafter entered upon their duties. No part of the said amount of six hundred thousand dollars, provided for by the act of 1870, was ever received or expended by them. 5. In the act of 1871, passed April 19, 1871, the legislature made a further direction in regard to the court house. 6. It will be seen, by a comparison of the two acts, that there is a material difference in the mode in which the amount to be raised under each act is to be expended. (*a.*) The act of 1870 makes the comptroller of the city of New York the disbursing officer, whereas, by the act of 1871 the comptroller is to pay over to the credit of the commissioners such sum or sums as they may from time to time deem necessary. 7. But nowhere in either act is there any authority permitting the comp-

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troller to pay any bill without the consent of the commissioners. (a.) Under the act of 1870, he could not pay except on vouchers approved by the commissioners, and (b.) Under the act of 1871, the actual payment of all bills is to be made by the commissioners themselves.

II. Unless the account of the relator has been submitted to the commissioners for their audit and approval they cannot by mandamus be compelled to pay it. 1. It is no answer to this that the account has already been audited and approved by the board of supervisors. The commissioners are not the successors of the board of supervisors. The supervision of the county court house was but a portion of their duties. The same routine had to be gone through with in collecting a bill for work done on the court house as in collecting a bill for any other county work. The board of supervisors were not legislated out of office by the act in question. They were not affected by it except in this one particular, that upon the appointment of the commissioners their power over the erection of the court house was to cease. 2. The act of 1870 conclusively shows that no part of the appropriation of six hundred thousand dollars could be expended by the comptroller, except upon vouchers approved by the commissioners. The discretion was thus given the commissioners to allow or reject claims as they might see fit, and the comptroller could not pay or be compelled to pay any bill, unless first audited and approved by the commissioners. 3. This power conferred on the commissioners by the act of 1870, is not taken away by the act of 1871, but, on the contrary, their power in this respect is increased; instead of the comptroller being the custodian of the funds to be raised and expended on the court house, the commissioners themselves are not only to direct how it shall be expended, but are actually to disburse it. "The comptroller of the city

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shall, on requisition of the commissioners of said county court house, pay over to their credit such sum or sums as they may from time to time deem necessary." The commissioners are thus, from time to time, to pass upon claims for work done on, or materials furnished to, the court house, and having arrived at the amount due, are then to make their requisition on the comptroller for an amount sufficient to pay the amount then owing, and upon said amount being passed to their credit they draw their warrants in payment of the various bills.

III. The bill of the relator having been audited and allowed by the board of supervisors, and approved by the mayor, and audited and found correct by the auditor, and paid in part by the comptroller, the liability is fixed, and no proceeding can be had against the commissioners to compel payment. 1. The bill was audited, allowed, and part paid before the commissioners came into existence. The relator had his remedy by which he could have enforced the payment of the balance due on his bill, and nowhere does it appear that that remedy is gone.

IV. The commissioners were appointed for the sole purpose of completing the county court house, and therefore they are clearly not chargeable with the payment of bills for work done on the court house long prior to their appointment. 1. This appropriation of seven hundred and fifty thousand dollars, appropriated by section 7 of the act of 1871, and out of which appropriation the relator is directed to be paid, was "for the completion of the New York county court house." 2. The act under which the commissioners were appointed provided that they should expend and complete said court house for a sum not exceeding six hundred thousand dollars, and this amount being exhausted, and the building still uncompleted, the further appropriation of seven hundred and fifty thousand dol-

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lars was provided for in the act of 1871. 3. The words "complete" and "completion" cannot possibly be so construed as to authorize the commissioners to pay indebtedness which accrued prior to the appropriation. At the time the appropriation was made the court house was, and in fact still is, an incomplete and unfinished building. The appropriation was made for the sole purpose of making it a complete and finished building. Suppose the county of New York was, prior to the act of 1871, indebted for work done on the county court house in an amount exceeding seven hundred and fifty thousand dollars ; can it for one moment be contended that the payment of this amount by the commissioners would complete the building? 4. Neither the act of 1870 nor 1871 warrants any such belief. The building was incomplete, and all the legislature had in view when they authorized the appropriations contained in section 11 of the act of 1870 and section 7 of the act of 1871 was to provide funds to render the building complete. 5. That such was the intention of the legislature is clearly shown by reference to section 4 of the act of 1870. It is conclusively shown by this section that the legislature had just such claims as the one in controversy in view when the act was passed. The bill of the relator was a liability against the county of New York, and against no other body or corporation. It was a fixed liability, and was incurred prior to the passage of this act ; and the fact is the officers mentioned in said act did meet as a board of audit, and audit many claims which existed against the county, and the comptroller paid the same. Had the relator seen fit to have presented his claim to the notice of the said officers, they would have been compelled to provide for to provide for its payment. 7. In order to sustain the theory that the words "to complete" and "completion" apply equally to the payment of past indebtedness as well as to future work, the case of *People v.*

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Rushmore, is cited, in which case it was held by the general term of the second department that where the legislature appropriated money for the purpose of completing the Westchester turnpike and Boston post road, the court could, by mandamus, compel payment for work done on the turnpike prior to the appropriation. (a.) Without conceding the correctness of this decision, it is sufficient for the purposes of this case to say that nowhere in the act making such appropriation was there any provision providing for the payment of past indebtedness for work already done. (b.) Section 4 of the act of 1870 distinctly provides for the payment of liabilities against the county of New York, and had there been such a section in the act referred to in the above case, it cannot for one moment be contended that any such construction would have been put on it.

SUTHERLAND, J.—The application is for a mandamus to the commissioners of the new county court house, or to the comptroller, or to both.

If the mandamus goes to the commissioners, the application is that it goes to them commanding them to pay the relator or surviving partner of the late firm of J. B. & W. W. Cornell, thirty-four thousand seven hundred and twenty-five dollars and forty-eight cents, with interest thereon from December 7, 1869, out of the sum of two hundred thousand dollars heretofore placed to the credit of the commissioners by the comptroller, pursuant to section 7 of the act of April 19, 1871, or commanding the commissioners forthwith to issue their requisition upon the comptroller, requiring him to pay over to the relator the said sum of thirty-four thousand seven hundred and twenty-five dollars and forty-eight cents, with interest as aforesaid. The application is made upon three several and distinct notices of motions for a mandamus founded upon one and the same affidavit of the relator. The case made by

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this affidavit, as briefly as is consistent with perfect clearness stated, is this :

The relator is the sole surviving partner of the late firm of J. B. & W. W. Cornell, manufacturers of iron for building in the city of New York. By the act of April 10, 1861, the board of supervisors of the city of New York were authorized to direct and superintend the construction of a court house on certain lands in the city of New York, which, by the act, they were authorized to take for that purpose.

Under and in pursuance of said power, the board of supervisors, on November 17, 1863, entered into a contract with the said firm of J. B. & W. W. Cornell (a copy of which and of the specifications therein referred to is annexed to the affidavit) in and by which the said firm agreed to furnish and deliver certain work, labor, and materials mentioned in the contract and the specifications thereto annexed.

That besides work, labor, services and materials furnished and delivered by the said firm prior to July 7, 1868, for which bills had been rendered, audited by the board of supervisors and paid by the comptroller, the said firm, under and in pursuance of the contract, furnished and delivered in and towards the erection, and construction, and completion of the said court house, work and materials to the amount of sixty-five thousand five hundred and ninety-nine dollars and eighteen cents, the items thereof being contained in a certain bill which had been rendered to and audited by the board of supervisors, a copy of which bill is annexed to the affidavit.

All the items contained in said bill are correct, and were actually and in fact furnished and delivered in and towards the construction of said court house, were necessary for and were applied to the use of said court house ; and the prices charged in said bill therefor are

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just and reasonable, and the prices to be paid therefor by the terms of the contract.

Said bill was duly verified, and certified by the superintendent of the construction of said court house to be just and correct, and according to the contract.

The said bill, with the said verifications and certificate, was rendered to the board of supervisors, and subsequently duly audited and allowed by said board at a meeting held on or about July 5, 1869. The action of the board of supervisors was subsequently approved by the mayor of the city of New York, as appears by the certificate of the clerk of the board of supervisors, a copy of which is annexed to the affidavit.

The said bill was subsequently examined by James Watson, then county auditor, and found correct, as appears by his indorsment on the bill on file in the office of the comptroller, a copy of which indorsement is annexed to the affidavit; thereupon payment of said bill was demanded of the comptroller, and on December 6, 1869, the sum of thirty-two thousand seven hundred and ninety-nine dollars and fifty-nine cents was paid on account of said bill to the firm of J. B. & W. W. Cornell by a warrant on the county treasurer, drawn by the Hon. R. B. Connolly, comptroller, and duly signed and countersigned, as provided by law.

When such payment was made, there was due and owing upon said bill sixty-five thousand five hundred and ninety-nine dollars and eighteen cents, with interest thereon from July 5, 1869, to December 6, 1869, amounting to one thousand nine hundred and twenty-five dollars and eighty-nine cents, making in the aggregate sixty-seven thousand five hundred and twenty-five dollars and seven cents from which, deducting the payment of thirty-two thousand seven hundred and ninety-nine dollars and fifty-nine cents, there is remaining due and unpaid on account of said bill thirty-four thousand seven hundred and twenty-five dollars and

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forty-eight cents, with interest thereon from December 6, 1869.

By acts of the legislature, passed in 1862, 1864, 1865, and 1866, more than two million six hundred thousand dollars in the aggregate were directed to be raised by the board of supervisors of the county of New York, by tax or loan, or by the issue of stocks, to be applied, by or under the provisions of the acts, to the erection and construction of said court house; and the money so raised was directed by the acts to be paid by the comptroller on bills for work and materials furnished to said court house, audited and allowed by the board of supervisors. The sums of money directed by these acts to be raised were raised in the manner directed by the acts, and received by the comptroller for the purpose provided in the acts.

By an act passed April 25, 1867, the said board of supervisors were directed to raise the further sum of eight hundred thousand dollars for the completion of said court house, which further sum was raised by tax and received by the comptroller for the purpose provided in the act.

By an act passed June 3, 1868, the comptroller of the city of New York was authorized to raise, on the stock of said county, the further sum of eight hundred thousand dollars for the completion, fitting up, and furnishing of the said court house, which further sum of eight hundred thousand dollars was raised and received by the comptroller for the purpose mentioned in the act, and was by the act to be paid by the comptroller on bills audited and allowed by the board of supervisors. By an act passed May 12, 1869, the said comptroller was directed to raise on the stocks of the said county the further sum of six hundred thousand dollars for the completion, fitting up, and furnishing the said court house; and by said act it was provided that the money so raised should be paid by the comp-

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troller on bills audited and allowed by the board of supervisors; and the said further sum of six hundred thousand dollars was raised and received by the comptroller for the purpose in the act mentioned.

The relator and affiant is informed and believes that at the time of the auditing and allowance of the said bill by the board of supervisors as aforesaid on July 5, 1869, and at the time of the demand for the payment thereof made on the comptroller as aforesaid, there was remaining in the hands of said comptroller of the said above-mentioned appropriations, or some of them, applicable to the payment of said bill, a sum of money far more than sufficient to pay the said bill in full, and that it thereupon became, and has ever since been, and is now the duty of the said comptroller to pay the said bill in full.

After the said payment on account of said bill on December 6, the relator and affiant called at various times on the comptroller, with reference to the payment of the balance due on the bill, and the comptroller on each of the occasions promised that he would pay the balance.

By an act of the legislature, passed April 26, 1870, the mayor of the city of New York was authorized to appoint four commissioners, and by such act it was provided that upon the appointment of said commissioners, all powers of the board of supervisors over the erection of said court house should cease; and by the said act, the said commissioners were given the power to superintend and complete said court house for a sum not exceeding six hundred thousand dollars, which amount the comptroller was authorized and directed to raise on stock of said county of New York.

After the passage of said act in the year 1870, the said mayor appointed Thomas Coman, Michael Norton, James H. Ingersoll, and John J. Walsh such commissioners, who accepted such appointment, and have

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ever since been and are such commissioners ; and the relator and affiant is advised and believes that such commissioners, by virtue of said act and appointment, became and are the successors to the board of supervisors with reference to the construction and completion of said court house, and all contracts made therefor and work done thereon.

The said sum of six hundred thousand dollars was raised as directed by the said act, and was received by the comptroller for the purposes mentioned in the act. The relator and affiant called upon the said comptroller after the passage of said act, and in the spring of 1870, and the comptroller told him that the balance due on said bill should be paid by him (the comptroller) out of said last-mentioned appropriation ; and afterwards, in the summer of 1870, the relator and affiant called on the comptroller, and was then told by the comptroller that as soon as W. Watson, the chief clerk of the comptroller, got to town, which would be in about ten days, the balance due on said bill would be paid, either with bonds or in cash.

The relator and affiant (and here I quote the words of the affidavit) is informed and believes, that large amounts of the last-mentioned appropriation have been paid by the said comptroller on alleged claims for work done and materials furnished to the said board of supervisors, upon or with reference to the said court house, prior to the passage of the said act of April 26, 1870, and prior to the appointment of the said commissioners, but subsequent to the auditing and allowance of the said bill of J. B. & W. W. Cornell on July 5, 1869, and that said payments, or some of them, were made by the said comptroller without the proper vouchers therefor, and in violation of law ; that among such payments are the following payments (as appears by entries in the books of the said comptroller), which payments were made to one Andrew J. Garvey, at the

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following dates, alleged in said entries to have been done at the following times :

<i>Date of Payment.</i> 1870.	<i>Character of Work.</i>	<i>Date on which Work was Done.</i>	<i>Amount Paid.</i>
May 6..	Paid for plastering in court house.....	Dec. 4, 1869..	\$46,025.67
May 14..	Paid for plastering and mason work in court house.	Dec. 2, 1869..	45,355.92
May 14..	Paid for painting and decorating in court house .	Dec. 22, 1869..	44,255.85
May 21..	Paid for painting and decorating in court house .	Dec. 21, 1869..	44,094.91
May 21..	Paid for painting and decorating in court house .	Dec. 23, 1869..	44,281.16
May 21..	Paid for plastering and mason work in court house.	Dec. 11, 1869..	45,444.46
May 27..	Paid for materials and labor in court house	Dec. 24, 1869..	40,870.85
May 28..	Paid for materials and labor in court house	Dec. 24, 1869..	43,390.81
May 30..	Paid for materials and labor in court house	Dec. 24, 1869..	40,895.34
June 3..	Paid for materials and labor in court house	Dec. 24, 1869..	43,942.16
June 3..	Paid for repairs and materials in county buildings and offices	Nov. 29, 1869..	41,309.63
June 3..	Paid for repairs and materials in county buildings and offices	Nov. 26, 1869..	41,180.43
June 6..	Paid for labor and materials in court house	Dec. 16, 1869..	41,563.42
June 6..	Paid for labor and materials in court house	Dec. 24, 1869..	40,971.15
June 6..	Paid for labor and materials in court house	Dec. 24, 1869..	40,652.43
June 6..	Paid for labor and materials in court house	Dec. 24, 1869..	43,774.26

And deponent further shows, on information and belief, that some of said payments were made out of the said last-mentioned appropriation of six hundred thousand dollars, and some of them out of the previous appropriations hereinbefore mentioned, and that, as deponent is informed and believes, the amounts of said payments are very largely in excess of the amounts to which the said Garvey was entitled for the labor and materials furnished by him to said court house, and that bills for the amounts of said payments, or some of them, were not presented, audited, and allowed in the manner required by law, and that said payments, or some of them, were made by the said comptroller without the proper vouchers therefor, and in violation of law.

By an act of the legislature, passed April 19, 1871, there was authorized to be appropriated for the completion of the said court house the sum of seven hundred and fifty thousand dollars, to be expended under the direction and supervision of the said commissioners, and it was further provided that the comptroller

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should, on requisition of the said commissioners, pay over to their credit such sum or sums as they may from time to time deem necessary for such purpose, and the said comptroller was authorized by said act to raise said amount on the stock of the county of New York.

The relator and affiant is informed and believes, since the passage of said act, the said comptroller has raised said amount as in and by said act directed, and has received the said amount for the purpose mentioned in the act, and that all of said amount remains in the hands of the comptroller unexpended, except about the sum of two hundred thousand dollars, which has been placed to the credit of the said commissioners by said comptroller, and the whole of which last-mentioned sum of two hundred thousand dollars, or a large part thereof, remains in the hands of said commissioners unexpended.

On July 11, 1871, the relator and affiant caused to be served upon the said commissioners a demand duly verified (a copy of which is annexed to the affidavit) to the effect that the said commissioners make a requisition upon the comptroller for the payment by the comptroller to the relator and affiant, as the surviving partner of the firm of J. B. & W. W. Cornell, of the balance of the bill allowed and audited, as aforesaid, on July 5, 1869. From the copy of the demand on the commissioners, annexed to the affidavit of the relator and his affidavit, it appears that such demand was in the form of a notice in writing addressed to the said commissioners, individually by name as such commissioners; that annexed to said notice and referred to therein, as thus annexed, was a copy of the said bill for work, and so audited and allowed by the board of supervisors on July 5, 1869, and that said notice or demand was to the effect that the original of said bill was on file in the office of the comptroller; that said

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bill had been audited and allowed by the board of supervisors as aforesaid ; that the action of the board of supervisors had been approved subsequently by the Hon. A. Oakey Hall, the mayor of the city of New York, as appeared from the certificate of the clerk of the board of supervisors ; that the bill was subsequently examined by James Watson, the county auditor, and found correct, as appeared by his indorsement on the original bill in the office of the comptroller ; that on December 6, 1869, thirty-two thousand seven hundred and ninety-nine dollars and fifty-nine cents had been paid by the comptroller on account of the bill ; that there was due and owing upon the bill at the time of said payment, sixty-five thousand five hundred and ninety-nine dollars and eighteen cents, with interest thereon to December 6, 1869, amounting to one thousand nine hundred and twenty-five dollars and seven cents, making an aggregate sum of sixty-seven thousand five hundred and twenty-five dollars and seven cents ; that after deducting from said aggregate sum the payment of thirty-two thousand seven hundred and ninety-nine dollars and fifty-nine cents, there remained due and unpaid on account of said bill the sum of thirty-four thousand seven hundred and twenty-five dollars and forty-eight cents ; that the firm of J. B. & W. W. Cornell, at the time the contract for the work, labor, and materials mentioned in the bill was executed, and the work, labor, and materials performed and furnished, was composed of John B. and William W. Cornell ; that the said William W. Cornell died on March 17, 1870, and that thereupon the said John B. Cornell (the relator and affiant) remained the surviving partner of the firm, and that therefore the said John B. Cornell, as such surviving partner, demanded of the said commissioners that they, as such commissioners, make a requisition on the comptroller of the city and county of New

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York for the payment by the comptroller to the said John B. Cornell of the sum of thirty-four thousand seven hundred and twenty-five dollars and forty-eight cents, with interest thereon from December 6, 1869.

It further appears, from the affidavit of the relator and affiant, that copies of all the papers referred to in the said demand or notice were annexed to said demand or notice. Subsequently the relator and affiant, on learning that two hundred thousand dollars or thereabout had been placed to the credit of the commissioners on or about July 18, 1871, caused a further demand to be served on the commissioners (a copy of which is annexed to the affidavit), that they pay to the relator and affiant the amount of the balance of the said bill audited and allowed as aforesaid, on July 5, 1869. On July 20, 1871, the relator and affiant caused to be served upon the comptroller a demand (a copy of which is annexed to the affidavit) to the effect that the comptroller pay to the relator and affiant, as surviving partner of the firm of J. B. & W. W. Cornell, the balance of said bill as audited.

None of the said demands have been complied with, and no part of the balance of said bill has been paid, but the whole amount thereof remains due and owing to the relator and affiant as such surviving partner, as aforesaid, to wit: the sum of thirty-four thousand seven hundred and twenty-five dollars and forty-eight cents, with interest thereon from December 6, 1869.

In answer to this case made by the affidavit of the relator, Mr. O'Gorman, corporation counsel, read two affidavits of the comptroller, one purporting to have been verified on August 14, 1871, and the other purporting to have been verified on August 16, 1871.

In and by the first, the comptroller says in substance and effect, that he has no funds legally applicable to the payment of the claim of the relator, and in words says further, that all the moneys authorized by the

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legislature to be raised from time to time, for the purpose of said new county court house, have been expended in accordance with the statute made therein, save as hereinafter mentioned ; that the only funds remaining in the county treasury, legally applicable to the payment of the liabilities incurred in the erection of said court house, are those authorized and directed to be raised for that purpose by the legislature of 1871 ; and that deponent further avers that no payments for or on account of said court house have been made by him, unless in accordance with law, as he is advised.

In and by the other affidavit of the comptroller, purporting to have been verified on August 16, 1871, the comptroller says in words, that there is no money in the city or county treasury of New York, applicable to, or appropriated for, the payment of the claims of the relator herein, or for the payment of any other claim or claims for work done, or materials furnished upon or in the construction of the new county court house therein ; and by *Laws of 1871*, ch. 583, § 11, the deponent is authorized to issue stock of the value or amount of seven hundred and fifty thousand dollars for the completion of the said court house ; that he has not issued, or caused to be issued, the said stock, or any part thereof ; that all sums of money heretofore issued, or appropriated for the construction of said court house are and have been expended.

In answer to the case made by the relator's affidavit, Mr. Ambrose Monell, for the commissioners, reads two affidavits, one of Thomas Coman, one of the respondents and commissioners, purporting to have been verified on August 15, 1871, to the effect that, since the appointment of the said commissioners, the relator had never presented the bill referred to in his affidavit to the said commissioners for audit, and that the same had not been approved and audited by the commis-

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sioners, and stating further in words that he is informed and believes that the said bill of the relator is grossly extravagant, both as to the amount of materials alleged to have been furnished, and the price charged therefor, and in deponent's judgment it is highly important that the said bill should be presented to the said commissioners for audit before being paid.

The other affidavit, read by Mr. Monell for the commissioners, by James H. Ingersoll, another of the commissioners and respondents, purporting to have been verified August 15, 1871, states that no part of the two hundred thousand dollars stated in the affidavit of the relator to have been received by the commissioners is remaining in their hands, but the whole of said two hundred thousand dollars had been expended by said commissioners in the purchase of materials and in payment for work done on said court house since their appointment as commissioners thereof.

Having stated the case made by the papers on both sides, and the only papers before me on this application (three several motions on three several notices on one and the same affidavit having been heard together, and treated as one motion), I will briefly state my conclusions :

1. The bill of the relator having been certified and verified by the superintendent of the court house, and having been audited and allowed by the board of supervisors, and approved by the mayor, and audited and certified to be correct by Watson, the county auditor, and paid in part by the comptroller, and the relator swearing *positively* that all the items in it are correct, and were actually furnished and delivered under and in accordance with the contract, and that the prices charged are the prices to be paid therefor by the contract—I do not think that the general allegation on information and belief in the affidavit of Mr. Coman, one of the respondents, and one of the commissioners,

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that the bill is grossly extravagant, would justify me in entertaining a doubt that the bill was and is honest, and just and correct, and that the balance due on it, with interest on such balance from the time of the payment on account thereof by the comptroller, ought to be paid by some one or from some source.

2. Considering that the very general allegations of the relator in his affidavit, to the effect that payments had been made by the comptroller out of the six hundred thousand dollars raised under the act of April 26, 1870, without proper vouchers, and in violation of law, and that certain specified payments had been made to Garvey, out of said six hundred thousand dollars, and out of previous appropriations, largely in excess of what Garvey was entitled to, and that some of said payments to Garvey were made without the proper vouchers, and in violation of law, are made on information and belief merely; and considering that the comptroller by his affidavit, purporting to have been verified on August 14, 1871, swears *positively* to the effect that he has no funds legally applicable to the payment of the relator's claims, and that all the moneys which had been authorized to be raised for the new county court house had been expended "in accordance with the statutes made therein, save only funds remaining in the county treasury," authorized and directed to be raised by the legislature of 1871, and that no payment for or on account of said court house had been made by him, unless in accordance with law, as he is advised;—I do not think that I can or ought to issue a mandamus commanding the comptroller to pay the relator's claim generally, or on the theory that he has funds applicable to the payment of the relator's claims raised under or appropriated by any act or acts of the legislature, passed prior to the act of April 19, 1871 (*Laws of 1871, ch. 583*).

3. In view of the positive affidavit of the respond-

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ent and commissioner Ingersoll, to the effect that all of the two hundred thousand dollars, stated in the affidavit of the relator to have been paid to the commissioners, or passed to their credit by the comptroller, had been expended, I think I cannot and ought not to issue a mandamus to the commissioners, commanding them to pay the relator's claim out of the said two hundred thousand dollars.

4. The relator in his affidavit says, on information and belief, that two hundred thousand dollars, directed to be raised for the court house by the act of 1871, had been paid by the comptroller to the commissioners. Commissioner and respondent Ingersoll admits by his affidavit that the commissioners have received the two hundred thousand dollars from the comptroller, and says that they have expended the whole of it. The comptroller says in one of his affidavits (the last) that he has not issued or caused to be issued the seven hundred and fifty thousand dollars of stock, authorized to be issued by the act of 1871. He does not deny that he has paid to or placed to the credit of the commissioners the two hundred thousand dollars. I must assume that the comptroller advanced from some fund, from some source, the two hundred thousand dollars, in anticipation of issue of stock under the act of 1871. By section 7 (not 11) of the act of 1871, seven hundred and fifty thousand dollars is authorized to be appropriated, to be expended under the direction and supervision of the commissioners for the completion of the court house, and the same section directs the comptroller, on requisition of the commissioners, to pay over to their credit such sum or sums as they may from time to time deem necessary for said purposes, and by the same section the comptroller is authorized and directed to raise said amount (seven hundred and fifty thousand dollars) on the stock of the county of

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New York, to be of the usual form, and payable within twenty-five years from its issue.

In view of my conclusions on other points of the case, made by the papers, the only remaining question is, ought the court by mandamus to direct the comptroller to raise the seven hundred and fifty thousand dollars which he is authorized and directed to raise in or by section 7 of the act of 1871, in the manner therein directed and authorized, or sufficient of that sum or amount to pay the relator's claim, and, when raised, either to pay the claim himself, or to pay over to the commissioners on their requisition, to be applied to the payment of the claim by them, an amount or sum sufficient to pay it; and ought the commissioners, by the mandamus, to be directed to make their requisition on the comptroller to pay the claim, or for the comptroller to pay over to them an amount or sum sufficient to satisfy the claim?

I have carefully considered the elaborate and able brief of Mr. O'Gorman, mainly on this point (and I really think it may be considered as really the only question on the case made by the papers), and without pretending that the question is entirely free from doubt, yet I have come to the conclusion that it is the duty of the court, on the case made by the papers, to try to secure by mandamus the payment of the relator's claim out of the seven hundred and fifty thousand dollars authorized and directed to be raised in and by section 7 of the act of 1871, and that on the settlement of the order for a mandamus for such purpose, and of the form of the writ, the order and writ should be so worded as most likely and properly to secure such a result.

I think that so much of the seven hundred and fifty thousand dollars as shall have been used in paying the relator's claim may fairly have been said to have been expended for or in the completion of the

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court house. I cannot believe that the legislature intended that a building for the administration of justice should be completed, or considered as completed, until the honest and just debts incurred in the erection and completion had been paid or provided for.

Without ever adverting to many of the considerations which have led me, under the circumstances of the case, to put a construction on section 7 of the act of 1871, which will permit a mandamus to issue in the best form to secure payment of the relator's claim out of the seven hundred and fifty thousand dollars authorized and directed to be raised by the comptroller in and by that section, I will say that the controlling consideration has been that I cannot see any grounds for doubting that the claim is honest, and just, and correct; and that I cannot see that the relator has any remedy by action against the board of supervisors, or city corporation, or any body, or person or persons.

I see no way in which the relator can enforce payment except by mandamus from or out of the seven hundred and fifty thousand dollars authorized and directed to be raised by section 7 of the act of 1871. The bill of the relator having been audited and allowed by the board of supervisors, and approved by the mayor, and audited and pronounced correct by the auditor, and paid in part by the comptroller, I do not think the relator was called upon, or bound to present it, or the balance due on it, to the commissioners for a reauditing by them.

Let the form of the order, and of the mandamus to be made and issued according to the opinion, be drawn by the counsel for the relator, or one of them, and settled on notice.

NOTE.—An order for the issuing of a writ of mandamus to the commissioners to compel them to make their requisition on the comptroller, was accordingly issued in the following form :

Reeves v. Denicke.

REEVES *against* DENICKE.*New York Superior Court; Special Term, June, 1871.*TRADEMARK.—RIGHT TO USE FIRM NAME.—EFFECT
OF PURCHASING PARTNERSHIP PROPERTY.

A purchaser of all of the partnership property of a firm, on their dissolution, does not thereby acquire the right to use the firm name as a label on his goods, or to advertise himself as the successor of such firm, and will be restrained in so doing.

At a special term, &c.

[*Titles of the three causes.*]

[The order here recited the making of the three several motions and their nature, and the papers on which they were made, and those read in reply, and the hearing of counsel on all sides, and continued as follows:]

“It is hereby ordered and adjudged, that a peremptory writ of mandamus forthwith issue from this court, commanding the said Michael Norton, Thomas Coman, James H. Ingersoll, and John J. Walsh, commissioners of the said new county court house, in the city of New York, forthwith to make, issue, and deliver to the said Richard B. Connolly, comptroller of the city of New York, the written requisition of the said commissioners upon the said comptroller, requiring the said comptroller to pay upon the credit of the said commissioners to the said relator, as surviving partner of the late firm of J. B. & W. W. Cornell, the sum of thirty-four thousand seven hundred and twenty-five dollars and forty-eight cents, with interest on said sum from December 6, 1869, out of moneys sufficient in amount to pay the said sum of thirty-four thousand seven hundred and twenty-five dollars and forty-eight cents, with interest thereon as aforesaid, which shall or may first be raised and come into his hands under and in pursuance of the authority and direction contained in and given by the said section 7 of the act of the legislature above mentioned; and further commanding the said Richard B. Connolly, comptroller of the city of New York, upon receiving the said requisition, forthwith to take the requisite and proper steps, and commence and carry through with all diligence the requisite and proper proceedings to raise the said amount required by said requi-

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The case of Peterson v. Humphrey (4 Abb. Pr., 394), criticised and disapproved.

On an application to restrain the unauthorized use of a firm name, it is not necessary to show that actual damage or loss has accrued to the plaintiffs.

Motion to continue an injunction *pendente lite*.

It was alleged on the part of the plaintiffs, that they were copartners, carrying on the business of an agricultural warehouse at No. 195 Water-street, in this city, under the firm name of "E. H. Reeves & Company," which business consisted in selling agricultural implements, tools, machinery, roots, seeds and plants, to agriculturists in different parts of the United States, the British Provinces, &c.

That for upwards of ten years previous to May 8, 1871, the plaintiff, Edgar H. Reeves, had been associated in such business with one or more partners, and had carried on such business at 185 Water-street.

sition, to wit: the sum of thirty-four thousand seven hundred and twenty-five dollars and forty-eight cents, with interest on the said amount from December 6, 1869, on the stock of the county of New York, as and in the manner authorized and directed by and under the provisions of section 7 of the act of the legislature of the State of New York, passed April 19, 1871, being chapter 583 of the Laws of 1871, and entitled "An act to make provision for the local government of the city and county of New York, and thereupon to pay upon the credit of the said commissioners to the said relator as surviving partner of the late firm of J. B. & W. W. Cornell, the said amount, to wit: the sum of thirty-four thousand seven hundred and twenty-five dollars and forty-eight cents, and interest on the said amount from December 6, 1869, to the date of such payment, with ten dollars costs to the said relator. And that the said above entitled and recited motions, and each of them, be and hereby are, in all other respects, denied."

On appeal the order was unanimously affirmed by the general term of the first department, consisting of Justices INGRAHAM, BARNARD and CARDOZO, on December 6, 1871. A peremptory mandamus was, on December 27, 1871, issued according to the above order, directed to the commissioners and comptroller.

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That it was the practice in said business to put upon each article sold, a label, bearing thereon, the words:

“From
E. H. Reeves & Co.,
Dealers in
Seeds,
Agricultural Implements, &c.,
185 & 187 Water-street, New York.”

By means of which label upon articles sent to purchasers in all parts of the country, Canada, South America and the West Indies, the said E. H. Reeves had become widely known, by name and reputation, as a dealer in the articles mentioned. That prior to May, 1871, the plaintiff, Edgar H. Reeves, was engaged in such business in connection with the defendants, as his partners, under the said firm name of E. H. Reeves & Company, at 185 Water-street. On the last-mentioned day said partnership was dissolved by mutual consent, and thereupon the said Edgar H. Reeves, for a sufficient consideration, sold and transferred to the defendants, “all his right, title and interest in the said partnership, and in all the avails and effects thereof, including all goods, wares, merchandise, stock in trade, money, bills, debts, dues and demands, and in all profits now accrued or that may hereafter accrue thereon.

It was then further alleged that immediately upon such dissolution, the plaintiff formed a partnership under the firm name of E. H. Reeves & Co., in carrying on the same business at the aforesaid numbers 185 and 187 Water-street, and that the defendants also formed a special partnership with the defendant Robert C. Reeves, as general, and the defendant Denicke, as the special partner, in carrying on the same business at the aforesaid numbers 185 and 187 Water-street.

It was further alleged, that for the purpose of inducing the belief that the plaintiff, Edgar H. Reeves, was no longer engaged in such business, or dealt in such commodities, and for the purpose of attracting to their said place of business, numbers 185 and 187 Water-street, persons acquainted with the name and reputation of said E. H. Reeves, the defendants have, since the commencement of their said partnership, continued to use upon labels placed upon all the goods sold by them, and upon bill heads and also upon a sign upon their said place of business, the name of "E. H. Reeves & Co.," together with the words "Robert C. Reeves, successor to," on or across the same; which latter words are less conspicuous than the former and less likely to attract attention.

The plaintiffs complained that the use of such name by the defendants, was injurious to the plaintiffs in their said business, and was calculated to and did divert custom therefrom, by inducing the belief that the said E. H. Reeves had ceased to be a dealer in such articles of merchandise. And the plaintiffs claimed that these acts of the defendants had already produced and would continue to produce great damage to them.

On these facts a preliminary injunction was granted.

This motion was to make it permanent. An affidavit on the part of the defendants read in opposition, stated the previous relation of the parties, and denied that the lettering of their sign, since the dissolution, was calculated to deceive the public. They also alleged that certain stencil plates and brands for stamping the firm name, and certain stereotype plates for printing catalogues, passed to them on the sale by E. H. Reeves of his interest in the partnership property.

A. J. Perry, for plaintiffs.

S. F. Cowdrey, for defendants.

Reeves v. Denicke.

MONELL, J.—Upon the dissolution of the firm, composed of the plaintiff, Edgar H. Reeves, and the defendants, the former, by a written conveyance, sold and transferred to the latter, all his interest in the partnership property and effects. Such property and effects were not described, and there was nothing, which in terms, would necessarily include, as a part of such property, the firm name of “E. H. Reeves & Co.,” under which the business of the partnership had previously been conducted; and therefore, unless such name was so far a part of the partnership property, that the right to use it passed to the defendants, under the general designation of “property,” or as constituting what is called the “good will,” its use by the defendants was unauthorized, and if injuriously affecting the rights or interests of the plaintiff, should be restrained.

That there may be and is “property” in a name, seems to be conceded, and the names of newspapers, hotels and places of amusement are instances of this species of property. Such names may be dealt with as property, and are the subject of sale and transfer, and are often of great value.

But the sale of a newspaper does not necessarily include the name by which it is designated and known. It may be of the type and presses only. And the sale of a hotel may be of the building merely. And where the name under which a business of any nature is carried on, is that of the *proprietor*, it would require clear and express words of conveyance, to secure a transfer to a purchaser of the right to continue the use of such name, for his convenience or profit.

When, therefore, the name and style of a mercantile firm is that of the principal, and most responsible and influential member of the partnership, the mere transfer of the interests of such member, in the partnership property, will not convey the partnership name to the

purchaser, or give to him the right to continue its use against the consent of such person.

In this case, the firm name of "E. H. Reeves & Co." was not sold or transferred to the defendants as constituting a part of the partnership property and effects. Nor did the sale, in terms or by necessary implication, include the good will of the business of the previous firm, and it is therefore unnecessary to determine whether the partnership name was a part of such good will. There was no restraint upon the retiring partner, holding him from engaging in a similar business; and he violated no obligation to the defendants, by forming a new firm, under his own name, and transacting a business in all respects like that which he had released to them.

It is quite clear, I think, that the defendants acquired no right to continue the use of the partnership name of the old firm. If the good reputation of that firm was intended to pass into and become a part of the defendants' new firm, it should have been provided for in the conveyance. That it was not intended it should pass, is evident from the omission to include it.

But the defendants claim that they merely continued the use of the old firm's name, for the purpose of designating themselves as the "successors to" said old firm. And they claim that they are the successors of such old firm, and therefore have an undoubted right to so designate themselves.

In the sense of a very common practice of persons who have acquired the property of an old and well established mercantile firm, of using the term "successors to" such firm, there may be an assumed right to so continue the use of such firm name. But such common practice does not give the right. It can be acquired only by a grant from the owner, and when such grant has not been made there is no succession to it.

It is a very common mistake to suppose that a
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purchaser of the property of a mercantile firm is the "successor" of the firm. He succeeds to the property, to all that is conveyed to him, but to nothing more; and he has no more right to describe himself as the successor of such firm, because he has purchased its property, than he has to designate himself the successor of a manufacturing company from which he had casually purchased some goods.

In any aspect of the case, I am unable to find any right in the defendants to use in their business the old firm name of "E. H. Reeves & Co.," either with or without the words "successors to," and that, therefor, such use by them is a proper subject for the exercise of the equity power of the court.

It is not very important, in deciding this motion, that I should see the precise nature and extent of the injury which the plaintiffs may sustain by the continuous misuse of the old firm's name. It is not difficult, however, to see that much injury may result from such misuse. But it is sufficient that the complaint alleges the injury and it is not now denied. And Mr. Justice STORY says (*Story on Partn.*, § 100), "that the right to use the name of a known and celebrated firm, is often a very valuable possession, and, therefor, courts of equity will interfere to protect the right against the abuse of third persons, in using it to their advantage."

The principle which must, I think, govern this case, is illustrated in the case in this court of *Howe v. Searling*, 6 *Bosw.*, 354; S. C., 10 *Abb. Pr.*, 264, where plaintiff sold his bakery, called and known as "Howe's bakery" to defendant, and the court restrained the latter from continuing the use of the plaintiff's name.

So in a case in the California courts (*Woodward v. Lazar*, 21 *Cal.*, 448), the name which a tenant had adopted for a hotel, was held to be his property, and did not revert or go to the landlord, at the expiration of the term; and the latter was restrained from con-

tinuing its use. And in *Knott v. Morgan*, 2 *Keen*, 213, a defendant was enjoined from using a name upon an omnibus, which had been previously adopted and used by the plaintiff. So in *Deiz v. Lamb*, 6 *Robt.*, 537, the defendant was perpetually restrained from using the name "Prescott House" upon his carriages. And *Christy v. Murphy*, 12 *How. Pr.*, 77, is another illustration, of the right of property in a name, and of the power of the court to restrain its misuse.

Indeed, the general principles which control, in cases of trademark, are analogous and entirely applicable to the species of property which is the subject of this action. And any unauthorized use of a trademark or name, although innocently used, if it work injury to the owner, will be restrained (*Millington v. Fox*, 3 *Mylné & C.*, 338).

The case of *Peterson v. Humphrey*, 4 *Abb. Pr.*, 394, greatly relied on by the defendants, qualifies the right to use the former name of a firm, by requiring that there must be such alterations or additions as are calculated to give notice of a change in the firm ; and it was there held that the use of the word "formerly," as designating the succession, was calculated to prevent deception. But it was not intended to decide, that any use of a former name, which *was* calculated to mislead the public, and injure the proprietor of such name, should not be prevented. I do not, however, admit the soundness of that decision, and should not adopt it, in opposition to my own views of the law applicable to this character of cases.

I am of the opinion, therefore, that enough appears in this case, to require the continuance of the injunction *pendente lite*. Upon the trial different facts may be established. Thus far the defendants have relied upon the supposed weakness of the plaintiff's case, and have not changed its aspect by any statements in their affidavits.

Swett v. City of Troy.

SWETT *against* THE CITY OF TROY.

Supreme Court, Third District; Special Term, February, 1872.

COMPENSATION.—EMINENT DOMAIN.—INJUNCTION.

One whose property is not actually and physically touched or taken, is not entitled to compensation for indirect or consequential injuries arising from the lawful and proper erection of a public work. *

Under sanction of the legislature, a railroad bridge was built over a stream within city limits; and, on the destruction of the bridge by fire, the city proceeded to erect another bridge on substantially the same site, but built it so that it might be used not only for a railroad bridge but also for the accommodation of foot passengers and teams. Plaintiffs, who owned a foundry on the stream, and relied mainly on the stream for power to propel their machinery, sought to enjoin the construction of the bridge until compensation was awarded them for the loss to them, produced by building the piers for the bridge in the channel of the stream.—*Held*, that no action would lie, as plaintiff's land was not touched, and the damage to them, if there were any at all, would be merely indirect or consequential.

An injunction should not be granted where the damages are capable of being estimated by a money standard and the defendant is able to respond.

Motion to dissolve an injunction.

George W. Swett and others obtained an injunction to restrain the construction by the city of Troy of a bridge over the Poestenkill, and within said city, in such manner as to obstruct the flow of the water from

* As to the measure of damages respecting a part not taken, where another part is taken, see 10 *Abb. Pr. N. S.*, 182, and cases cited.

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the plaintiff's foundry, and to prevent the free passage of ice from their dam. About twenty years before the action was brought, a bridge was erected at substantially the same locality by the Union Railroad Company, under an act of the legislature, passed June 20, 1851; such bridge was constructed with the consent of the city, and was used by said company for the passage of its cars and for other purposes, until it was destroyed by fire. The city of Troy resolved to construct another bridge at the same place, of capacity sufficient to accommodate such railroad company, and also to furnish a suitable bridge for the passage of teams and persons on foot; such bridge was being built of stone, with two piers located within the stream. The plaintiffs were the owners of and conducted a foundry and other works, and mainly relied upon said stream for power to propel their machinery. Their dam was situated a few rods from where the bridge was located; no portion of the plaintiff's land was touched or taken by the defendants in erecting said bridge. The plaintiffs claimed, however, that the construction of such piers in said stream would inevitably have the effect to prevent the water from flowing freely from their works, and would also obstruct the passage of the ice from their mill pond, thereby occasioning them serious injury and damage. They demanded that such bridge should not be constructed, in the manner proposed, until compensation was awarded to them. The affidavits read upon the motion were very conflicting upon the question whether or not the plaintiff's property would be injured by such bridge, on account of any serious obstruction in the flow of the water, or passage of the ice. There was also a disagreement in regard to the extent the street, with which said bridge was to be connected, was then and had been used as a highway or thoroughfare.

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Martin I. Townsend and Irving Browne, for plaintiffs.

R. A. Parmenter and John P. Albertson, for defendants.

INGALLS, J.—The Bridge in question is being constructed by the city of Troy, for public purposes, and within the limits of said city, upon one of the streets thereof, designated upon the map of said city, and no portion of the plaintiff's land is touched or taken. I am unable to distinguish this case in principle, from *Ely v. City of Rochester* (26 Barb., 134). There is a striking similarity between the facts of the two cases, and the reasoning of the court in that case applies with force upon the case under consideration.

A distinction is sought to be drawn by the counsel of the plaintiffs upon the ground, that in the case referred to, the bridge had been used as a public highway or thoroughfare for many years. Whereas in this case the bridge had been used, previous to its destruction, for railroad purposes only. If the latter fact should be deemed established, although the affidavits upon that question are very conflicting, I do not think the plaintiffs have succeeded in so far distinguishing their case, as to avoid the force and effect of the decision in *Ely v. City of Rochester*. In the last mentioned case the bridge was erected in 1824, with two abutments, and two stone piers located within the channel of the river, and was so used for a period of about thirty years. The new structure was built of stone with five arches supported by four stone piers in the channel of the river, with a stone abutment at each end of the bridge. The bridge which was destroyed by fire, and which the city of Troy is attempting to replace, was built about twenty years since, pursuant to an act of the legislature, passed June 20, 1851 (*Laws of 1851*,

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ch. 255), and previous to its destruction had been used for such public purpose. As to the nature and legal effect of such use, see *Bellinger v. New York Central R. R. Co.* (23 *N. Y.*, 42). The defendants now propose to construct two piers within said stream. I fail to see why the city of Rochester had acquired any greater right to obstruct the Genesee river by the erection therein of the additional piers, to the prejudice of the mill owners who were dependent upon said stream for propelling their machinery, than the city of Troy possesses to erect upon substantially the same site the bridge in question, after the former bridge had been used for so great a length of time for public purposes with the consent of said city and for its advantage. And especially so, when the city now propose to so construct the bridge in question as to accommodate not only the railroad company but also the public at large by making it a part of the highway of said city (See, also, *Radcliff v. Mayor, &c., of Brooklyn*, 4 *N. Y.*, 195; *People v. Kerr*, 27 *Id.*, 188; *Chapman v. Albany & Schenectady R. R. Co.*, 10 *Barb.*, 360; *Arnold v. Hudson River R. R. Co.*, 49 *Id.*, 108).

In the last case, GILBERT, J., remarks: "The cases establish the principle that the legislature may rightfully authorize the construction of railroads or other works of a public nature, *without* requiring compensation to be made to persons whose property has not *actually been taken* or appropriated for the use thereof, but who may nevertheless suffer *indirect* or consequential damages by the construction of such works. The case is clearly within the principle stated. What property of the plaintiffs has been taken or appropriated? None whatever. They may suffer an injury by having the easement or servitude with which the estate of their grantor, and the roadway of the defendants are burdened, impaired. But this is an injury which the property of the plaintiffs suffers in consequence

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of the construction of a public work under legal authority, and not the taking of their property. Such loss has always been regarded as *damnum absque injuria*, except in cases when by the statute compensation, is required to be made." In *Sedgw. on Stat. & Const. L.*, p. 519, under the title Taking Private Property for Public Use—When deemed taken,—the author remarks, "It seems to be settled, to entitle the owner to protection under this clause, the property must be actually taken in the physical sense of the word, and that the proprietor is not entitled to claim remuneration for *indirect or consequential* damage, no matter how serious or how clearly and unquestionably resulting from the exercise of the power of eminent domain. This rule has been expressly declared in many of the States of the Union." The author cites quite a number of decisions in the courts of this State and elsewhere in support of his position.

It has been before remarked that no portion of the plaintiffs' land has been taken or touched by the defendants. And the injury which the plaintiffs apprehend is indirect and consequential. There is no rule by which it can be ascertained or estimated, before the effect of the proposed structure upon the stream is observed, after its completion. Until then all conclusions in this respect must, at best, be only conjectural and uncertain.

We have been referred to a series of decisions bearing upon the rights of riparian owners and defining the nature of such rights. But the rule which obtains in such cases is not necessarily applicable, where, as in this case, the apprehended injury must be occasioned by an interference with a stream by the construction of a public work by public authority, and where the land of the party complaining is not actually taken. I am satisfied that within the principle settled by adjudged cases that the plaintiffs have failed to establish such an

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interest in real property to be affected in such manner by the structure in question, as to entitle them to demand compensation before the work is completed, or which justifies the continuance of the injunction.

Reference has been made to the case of George W. Swett against the Mayor, &c., of Troy, in which an injunction was granted and sustained. But in that case there was a direct physical injury to the plaintiffs' land, as the city undertook to fill up the plaintiffs' mill pond, and in part upon the land of the plaintiffs, which last mentioned fact creates the distinction in this respect between that case and this. It does not seem to be contended by the plaintiffs that the bridge is not being constructed with skill and in a proper manner to answer the purposes intended, and in this respect it is not objectionable.

The affidavits read upon this motion are numerous and very conflicting in regard to the probable effect which the structure will have, when completed, upon the flow of water from the plaintiffs' works, and also, in regard to the effect of ice in its passage from the plaintiffs' dam. Each party has advanced a theory in respect to the probable effect of the work in question, and endeavored to support it by facts and scientific investigations and speculations. In order to authorize the continuance of this injunction the plaintiffs are bound to establish a clear legal right to such injunction, and that they have no other adequate remedy. In *Sixth-avenue R. R. Co. v. Kerr* (28 *How. Pr.*, 283 ; affg. 45 *Barb.*, 138), SUTHERLAND, J., remarks : "The threatened injury or grievance must be irreparable, or such as cannot be compensated in damages at law, to authorize a court of equity to interfere." In the same case another member of the court says : "The injunction should be refused till the final hearing, when the subject of compensation can be considered, and if necessary, can then be enjoined, unless payment shall be made" (*Thomp-*

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son on Provisional Remedies, 207-208, and cases there cited). In this case there is no question as to the responsibility of the defendants to respond, in case the plaintiffs establish a legal claim to damages. Again, if the structure is completed, and it should be adjudged that it materially and permanently affects the plaintiffs' property to such an extent that it cannot be compensated by an award of damages, and that the plaintiffs are legally entitled to relief, it will be in the power of the court to compel a change or removal of the structure in question.

I conclude that the case does not authorize the continuance of the injunction, and the same must therefore be dissolved, with costs of this motion.

BARKER *against* CLARK.

City Court of Brooklyn ; General Term, March, 1872.

MONEY PAID.—MISTAKE OF FACTS.—REPRESENTATIONS AS TO RECEIVER'S TITLE. — FORM OF ACTION.

A receiver was appointed of the property of a judgment debtor, and the agent of the receiver collected the rents of an estate, of which the debtor had been appointed administratrix, as the intestate's widow. The agent collected these rents by representing to the tenants that the receiver was entitled to them, and they paid relying wholly thereon; and it did not appear that they were aware of the nature of the proceedings by which the receiver was appointed.—*Held*, that the money was paid under a mistake of facts, and could be recovered back.*

* Compare *Duncan v. Berlin*, 11 *Abb. Pr. N. S.*, 116.

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The mistake is not the less one of fact because it relates to the title of the receiver.

The tenants had the right to rely on the representations of the receiver and of his agent.

The tenants having assigned to the administratrix their claims to the return of the money, the action was properly brought by her, for the benefit of the estate.

It cannot be considered on appeal that the administratrix, the widow of the intestate had (and that the receiver, therefore, acquired), the title to one undivided third of the rents, it not appearing that the rents were the surplus remaining after payment of the debts of the intestate, nor that such claim was made or suggested on the trial of the cause.

The case may be regarded as an action for money had and received, though an allegation of fraud, not proved, be contained in the complaint.*

Appeal from a judgment.

Mary Ann Barker, as administratrix of Elijah C. Barker, brought this action against Lemuel B. Clark.

The summons was for specific sums with interest. The complaint, after alleging plaintiff's due appointment, residence, &c., set forth several causes of action, the statement of one of which, here, is sufficient to show all the questions raised.

It was alleged that one Sarah Rhone, before a day named, went into possession of a tenement, as tenant of plaintiff as administratrix, at an agreed quarterly rent; that at various times defendant represented to said Sarah that the interest of the said administratrix in said letting had been transferred to one Murphy, as receiver of the property, &c., of said Mary Ann Barker, and that defendant was duly authorized to collect the rents, and would dispossess the tenant if they were not paid to him as such agent; that induced by

* Compare *Coit v. Stewart*, p. 216 of this vol.; *Knapp v. Meigs*, 11 *Abb. Pr. N. S.* 405.

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such representations and threats, and believing them to be true, Sarah Rhone paid certain rents to defendant; that the representations were false and their falsity not discovered till after payment; and that the payments were made under a mistake of fact. It was also alleged that Sarah Rhone duly assigned to plaintiff her cause of action therefor.

The facts found by the referee, so far as now material, appear in the opinion.

After judgment for plaintiff, defendant appealed.

F. T. Fithian, for defendant, appellant;—As to the points that the recovery for money had and received could not be sustained under the complaint, which charged that the money was obtained under false and fraudulent representations, cited: *Hunter v. Powell*, 15 *How. Pr.*, 221; *Andrews v. Bond*, 16 *Barb.*, 633; *Edick v. Criim*, 10 *Id.*, 445; *Walter v. Bennett*, 16 *N. Y.*, 250; *Towle v. Jones*, 19 *Abb. Pr.*, 449. That the money was paid under a mistake of law and could not be recovered back: *Etling v. Scott*, 2 *Johns.*, 157; *Mowatt v. Wright*, 1 *Wend.*, 355; *Supervisors of Onondaga Co. v. Briggs*, 2 *Den.*, 26, 40; *Sprague v. Birdsell*, 2 *Cow.*, 419; *Clark v. Dutcher*, 9 *Id.*, 674; *Wyman v. Farnsworth*, 3 *Barb.*, 369; *Harlem R. R. Co. v. Marsh*, 12 *N. Y.* [2 *Kern.*], 308; *Lowber v. Selden*, 11 *How. Pr.*, 526; *Mutual Life Ins. Co. v. Wager*, 27 *Barb.*, 354. That plaintiff could not maintain the action as administratrix, and independently of the assignments: *Patrick v. Metcalf*, 37 *N. Y.*, 322; *Butterworth v. Gould*, 41 *Id.*, 450).

H. C. M. Ingraham and *John H. Knaebel*, for plaintiff, respondent;—As to what is a mistake of fact, cited: *COWEN, J.*, in *Wheadon v. Olds*, 20 *Wend.*, 176, and citing *Mowatt v. Wright*, 1 *Id.*, 360, and *Domat*.

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That the payments were not voluntary : *Lake v. Artisan's Bank*, 3 *Abb. Pr. N. S.*, 209 ; 3 *Keyes*, 276 ; *Waite v. Leggett*, 8 *Cow.*, 195 ; *Clark v. Dutcher*, 9 *Id.*, 674 ; *Wyman v. Farnsworth*, 3 *Barb.*, 369 ; *Forrest v. Mayor of New York*, 8 *Abb. Pr.*, 350. That as the agent had not paid over the money to his principal, he was personally liable to the plaintiff : *La Farge v. Kneeland*, 7 *Cow.*, 460 ; *Buller v. Harrison*, *Cowp.*, 565 ; *Hearsey v. Pruyn*, 7 *Johns.*, 179 ; *Mowatt v. McClelan*, 1 *Wend.*, 173 ; *Langley v. Warner*, 1 *Sandf.*, 209 ; *Colvin v. Holbrook*, 2 *N. Y. [2 Comst.]*, 129 ; *Costigan v. Newland*, 12 *Barb.*, 458). That no demand was necessary before suit : *Utica Bank v. Van Gieson*, 18 *Johns.*, 485 ; *McKee v. Judd*, 12 *N. Y. [2 Kern.]*, 622 ; *Waldron v. Willard*, 17 *Id.*, 466 ; *Haight v. Hayt*, 19 *Id.*, 464).

BY THE COURT.—NEILSON, J.*—The plaintiff, as the administratrix of the goods, &c., which were of her late husband, held a lease of a dwelling or tenement house in the city of New York, and let out portions thereof to tenants.

A judgment having been obtained against her personally, proceedings supplementary to execution were had, and Thomas Murphy was duly appointed the receiver of her property. The defendant represented the creditor in those proceedings, and served upon the tenants notices, signed by Mr. Murphy, requiring them to pay the rents to him. In that connection, the defendant stated to such of the tenants as he saw, that he was the one to collect the rents ; that he was entitled to receive the rents for Murphy, and that they must pay to him. The tenants, accepting as true the written statement of the receiver, and the assurances of the defendant, made payments, and afterwards assigned to the

* Present, McCUE and NEILSON, JJ.

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plaintiff, as such administratrix, their claims to the return of the money.

The rents belonged to the estate; were payable to the plaintiff, not in her own personal right, but in her representative capacity, and no claim to the rents passed to the receiver by virtue of his appointment.

But the question now presented is whether the money so paid could have been reclaimed by the tenants. The principle involved is familiar, and has been frequently illustrated and applied. If those payments were made under a mistake of fact, or by reason of the tenants having been misled, however innocently, they they were entitled to relief—otherwise not. Money paid with notice of the facts, without false inducements, and owing to an error of law, cannot be reclaimed. One who, in the free exercise of his will, makes a voluntary payment, or, buying peace, pays money to compromise a doubtful claim while under no obligation to do so, makes his election, and should not vex the courts to be relieved from a loss or burden thus assumed by him.

In some aspects of the case, separately considered, each branch of that rule would seem to be appealed to; proofs on the one hand indicating an error of law as to the effect of the leases; on the other a mistake of fact as to the title of the receiver, or such ignorance as might well minister to such mistake. Thus, for instance, these tenants knew that their leases had been given by, and that the rents were payable to the administratrix, but not that the receiver had been appointed of the plaintiff's individual property, as distinguished from that of the estate, or that the defendant, in coming forward to collect the rents, was a mere intruder. If the records of the judgment, and of Mr. Murphy's appointment, had been actually before them, and read in the light of an imputed knowledge of the law, they might have discovered the character of the

claim made by the receiver, and their right to withhold the payment sought to be exacted. If they had been expressly informed that the receiver had been appointed in proceedings supplementary to execution under the Code, they might have known that he had become invested with the title to the plaintiff's individual property only. But, for aught they knew, that appointment had been made in an equity action, and upon its having been adjudged that the rents really belonged to the plaintiff, in her personal right, and that the form of leasing and collecting rents, as if for the estate, was a mere cover, a device to hinder and delay creditors. Could they have known that a receiver of the rents had not, or could not have been appointed? Or that this receiver had no title to the rents? The information given in the written notices was not such as to enable them to form a correct legal opinion. Mr. Murphy stated that he had been appointed receiver "of the debts, property, equitable interests, and things in action of the said Mary Ann Barker," but coupled with, and as if to give point to that, was the specific claim to these rents as payable to him "as such receiver, and to no one else." That was calculated to fix the fact that the receivership covered these rents. It was intended to be so understood by the tenants, else why address them, or require payment from them? The peculiar notions which the tenants had of this business, as that they were *subpœnaed* to pay, and the like, have been disclosed in the testimony, and, while neither the defendant nor the receiver were accountable for impressions taking such form and complexion, they are chargeable with having substantially informed the tenants, and led them to believe, that a receiver of the rents had been appointed. They trusted to representations which appeared to relate to the facts (18 *Wend.*, 419).

Nor had Mr. Murphy himself any clearer concep-

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tion of the proceedings and of his office. He made no investigations, but accepted the appointment on the assurance that the property to come into his hands would be the rents. He acted on the defendant's suggestion,—signed the notices as prepared for him. None of the money came into his hands. If he had received the money, the court, whose officer he was, would have required him to surrender it (2 *Robt.*, 668). That which belonged to the estate, to be accounted for before the surrogate, could not have entered into the receiver's accounts, nor would any arbitrary assumption of authority by the receiver have been tolerated. The principle favoring such restitution for the benefit of those interested in an estate, even where there had been an assent to the payment by the administrator, under a mistake of law, is illustrated in *Davis v. Bagley* (2 *Am. R.*, 570), and the duty of the receiver to distinguish between what he should or should not claim, and in doubtful cases to apply to the court for instructions, is well understood (1 *Sandf.*, 724; 37 *Barb.*, 225; 7 *Robt.*, 613).

The claim by this receiver and the payments by the tenants appear to have been made under a mutual mistake of facts, all parties acting under a misapprehension. The defendant and Mr. Murphy are reliable and upright men, neither of whom would knowingly make an unfounded claim; yet the claims which they concurred in making had no foundation in law or in fact. If the defendant had not been under a misconception, how could he have stated to Mr. Murphy that the rents were to be received?—or have him sign the notices to the tenants?—or have enforced these claims by his own acts and words? It was assumed by all parties that Mr. Murphy had claims which he had not; that the rents were payable to him, when they were not; that the defendant was the one to collect the rents, when he

was not. The case, therefore, discloses sufficient evidence of the mutual mistake.

But, whether mutual or not, the mistake must have been one of fact, originating in ignorance, or attributable to undue influence, or fraud. Cases of this class are generally determined with especial reference to the circumstances peculiar to each; the error as to the facts more or less material, being mixed up with questions of law, or having to do with the good faith of the parties. It may often be difficult to distinguish between errors of law and of fact, both of which may be involved in the transaction without prejudice to the claim for relief (3 *Pars. on Cont.*, 399). Yet, while it is not desirable to limit the equitable remedy within the compass of a specific definition, the mistake of fact must be traced as a material element in the case. What error of fact? The question was put and answered by Mr. Justice MARCY, thus: "What sort of facts are meant? Such facts, I apprehend, as show that the demand on which the money was paid did not actually exist against the person paying, at the time the money was paid" (3 *Wend.*, 72). That is, a supposed demand against the person paying, in favor of the person receiving the money; a claim to which each party appeared to have some relation. If one owing money to A. pays it to B. by mistake of fact, or under a false inducement, the correction would be as just and proper, and as clearly within the rule, as if he had never owed the money at all.

In *Monell v. Wright* (1 *Wend.*, 360), Chief Justice SAVAGE, giving a general statement of the principle, says: "An error of fact takes place, either when some fact which really exists, is unknown, or some fact is supposed to exist, which really does not exist." The rule thus stated is sufficiently illustrated in cases where one entitled to the money on a second execution, assented to its payment to the plaintiff on the first ex-

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ecution, on the mistaken assumption that the property sold had been seized by the sheriff on the first execution within the time allowed by law (40 *N. Y.*, 391); where one ignorant of the fact that his claim had been allowed, contracted to pay another for services to be performed in procuring its allowance (11 *Pet.*, 68); and where money was paid in the belief that there was a claim when there was not (2 *Hall*, 252).

In this instance, the error related to the supposed title of the receiver to the rents. When the facts are known, the question of title is generally one of law. But the error may be as to some fact lying at the foundation of the title, and necessary to its existence, as where a sum of money was demanded and paid with the erroneous idea that a penalty had been imposed by statute (10 *Barb.*, 446); where a municipal corporation sold a term or interest in lands supposed to have been acquired by means of an assessment (26 *Barb.*, 423); and where the owner of land sold for taxes sought to redeem, and owing to the impression that he had failed to do so, and that the purchaser at the tax sale had acquired a term or estate, paid a consideration for an unnecessary conveyance (4 *Seld.*, 331). In such cases, the exercise of the power of correction commends itself to the judgment and conscience of all men. Hence it is, that from the case of *Bingham v. Bingham* (1 *Ves. Sr.*, 126),—that of the purchase by a party of his own land,—down to the late adjudications on the subject, relief has been granted on strictly equitable principles, and generally without manifesting a disposition to extend, or, even, very freely apply, the rule that money paid under a mistake of law cannot be reclaimed. Its application should be confined to cases falling strictly within it. The penalty imposed upon a mere layman who errs in regard to matters of law, as to which even lawyers might differ, may often seem hard, if not inequitable. It may impoverish him, may

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enrich his adversary. Cases where money has been obtained by oppression, extortion, or taking undue advantage of the party's situation, are not within the rule. Of course, a fraudulent representation takes the case out of the rule (16 *Barb.*, 342). But, accepting the doctrine in its severest spirit, the party aggrieved should have knowledge of the facts equal to that which is considered necessary to charge one with an adoption, election, assent, or ratification, as to the transaction which he seeks to repudiate. It is as if the payment or contract had been made on the express condition that the facts inducing the consent existed (1 *Am. R.*, 68).

It is true that these tenants might have inquired into these facts and taken advice, but they were not bound to do so (40 *N. Y.*, 391 ; 43 *Id.*, 452). But if the rule were otherwise, if they were bound to the prudent exercise of what knowledge they had and might have acquired, before making the payments, they were diverted from the performance of that duty by the statements of the receiver, and of the defendant. These statements were sufficiently affirmative and erroneous to amount to a misrepresentation. It may be assumed that they were innocently made, but that is no protection. Nor can it be said that the tenants should not have relied on the assurances made to them.

Upon a careful consideration of the case, I am satisfied that the tenants could have reclaimed the money paid, as they acted in ignorance of facts which were necessary to enable them to form a legal conclusion, and under an error superinduced, however innocently, by the defendant.

Why should the defendant retain the money? "It does not belong to him" (3 *Comst.*, 237). It was obtained "without consideration ; not as a gift, but under a mistake" (1 *Hill*, 290).

The letters of administration were sufficient evi-

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dence of plaintiff's authority to act. It is to be assumed that the preliminary steps required by statute had been taken.

It is claimed on the argument by the learned counsel for the appellant, that the receiver took title to one-third of the rents, the widow's distributive share. There are two difficulties in the way of that claim. First. It does not appear that these rents can be regarded as the surplus of the personal estate of plaintiff's decedent, remaining after the payment of his debts (2 *Rev. Stat.*, 183, § 82). Second. It does not appear that *that* special view or claim was brought to the notice of the referee.

The action was properly brought by the plaintiff, as assignee. It is only in respect to claims which, not having to do with property, do not survive,—claims for injuries to the person, which die with the person,—that the objection to an assignment now applies.

Though fraud be unnecessarily or improperly charged in a complaint, that is no objection, if sufficient facts to warrant a recovery for money had and received, be proved (24 *N. Y.*, 607; 10 *Abb. Pr. N. S.*, 437, and cases cited).

No error was committed by the referee in his rulings at the trial, and none of the exceptions to the report are well taken.

We are of opinion that the judgment should be affirmed, with costs.

Judgment affirmed with costs.

Spotts v. Dumesnil.

SPOTTS *against* DUMESNIL.*Court of Appeals ; March, 1872.*APPEAL FROM SURROGATE'S COURT.—DISMISSAL OF
APPEAL.

An appeal from an order or decree of a surrogate is wholly ineffectual, if security for costs of appeal is not given, as required by 2 *Rev. Stat.*, 610, § 108.*

That requirement is not repealed, as to the county of New York, by the act of 1870.

The court cannot relieve the appellant from the consequences of omitting to give security. †

The provisions of the Code do not apply to such appeals.

Appeal to the general term may be dismissed by motion at special term.

Appeal from an order.

Henry A. Dumesnil was administrator, and Jane P. Spotts was administratrix of Harry I. Spotts. Henry A. made his separate final accounting, on which he had the report of an auditor ; and the surrogate of the county of New York, upon motion, and after hearing all the parties in interest, confirmed the auditor's report, and made a decree of final settlement of the administrator's accounts. Immediately after making that decree, but before it was filed or recorded, the surrogate, upon motion and statement of the number of days they had been engaged in and in preparing for the proceedings, made an order granting to the ad-

* As to stay of proceedings in certain cases, see *Laws of 1871*, ch. 603.

† As to the form of the bond, and the power of the court to amend defects in it, see *Marvin v. Marvin* (11 *Abb. Pr. N. S.*, 97), and see note at end of the present case.

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ministrator and several of the other parties allowances for counsel, which the administratrix was required to pay from and out of the moneys of the estate. On that same day the decree and order were filed and recorded separately. Thereupon the administratrix and distributees informed the surrogate that they intended to appeal to the supreme court; and, subsequently, though still in the month of April, the surrogate required that before any appeal should be taken from the order or decree, the appellant or appellants should first deposit, under his direction, the sums or amounts ordered, decreed and required to be paid by the order or decree intended to be appealed from.

No steps whatever in reference to any appeal were taken until July 12, 1871, when the administratrix and distributees united in a notice of appeal to the supreme court from both the decree passing the accounts and awarding the commissions, and the subsequent order directing payment of allowances for counsel, which notice was that day filed with the surrogate.

Immediately before filing that notice, and on July 12, there had been entered in the supreme court an order "In the matter of the guardianship of Albert T. Spotts," one of the distributees, who had recently become of age. That order directed the United States Trust Company (the guardians) to, among other things, transfer from funds in their hands belonging to the estate, to the credit of the surrogate, as a special deposit, subject to the surrogate's order, in the matter of the decree of April 12, &c., the aggregate amount, with interest from April 12 to July 12, of the sums by the surrogate's decree and order required to be paid. To that clause in the supreme court order the attorneys for the several parties to this appeal had consented, the object of the clause being to enable the administratrix and distributees to comply with the surrogate's order for a

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deposit before appealing. But that order was never served on the surrogate at all, and was not served on the Trust Company until July 14. The transfer and deposit to the credit of the surrogate, on the books of the company, was not actually made until July 15. No bond conditioned that the appellants would prosecute their appeals to effect, and would pay all costs that should be adjudged against them by the appellate court, was ever filed with the surrogate.

On July 27 the petition of appeal from the surrogate was served. Upon it, and affidavits setting forth the facts above stated, and upon the proceedings in the surrogate's court, Dumesnil and the others who were named as respondents in that petition, moved the court at special term (chambers) for an order dismissing the petition and the appeals, for several grounds of irregularity,—among them, that no appeal bond had been filed with the surrogate; that the deposit required by the surrogate had not been made until the time to appeal had expired; and that the notice of appeal from the order respecting allowances should have been filed within thirty days after that order was made. The motion was opposed upon the grounds, among others, that it should have been made at a general term, and could not be entertained elsewhere; that it was unnecessary to file any appeal bond with the surrogate; that the clause of the Revised Statutes formerly exacting a bond was repealed by *Laws of 1870*, ch. 369, § 12; that the consent to the order of July 12 was a waiver of the appeal bond, if any could otherwise have been demanded; and that the decree of final settlement of the accounts was a final decree, and that the order for allowances, being entitled in the same matter, was properly treated as a part of the decree itself, and was, therefore, appealable three months after the decree was recorded.

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The motion in the supreme court was granted, the following opinion being rendered :

INGRAHAM, J.—The special term may entertain a motion to dismiss an appeal for irregularity.

An order making allowances, separate from the final decree, is a mere order, to be appealed from within thirty days, and an appeal after that time is a nullity.

The act of 1870 authorized the surrogate to require a deposit of money before appealing, and an appeal taken before such deposit was irregular.

The appellant might have been relieved by the court, by allowing the deposit afterwards on terms. As such deposit was made in July, and as the right of appeal would be lost if the appeal is set aside, the latter appeal should be allowed to remain.

The bond for one hundred dollars, as required by the Revised Statutes, should have been filed. That provision is not repealed by the act of 1870.

The motion to set aside the appeal as to allowances is granted, with ten dollars costs.

The motion to set aside the other appeal * is granted, unless the appellant within five days file such bond and pay ten dollars costs additional.

The administratrix and distributees appealed to the general term from so much of the order entered on that decision as dismissed their appeal from the surrogate's order respecting allowances.

At the general term that portion of the order was affirmed, and the appellants thence appealed to this court.

Joseph H. Dukes, for the appellants.

Burton N. Harrison, for the respondents.—I. In

* See note at end of case.

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moving to dismiss, for irregularity, the appeals from the surrogate's order and decree, the motion was properly made to the special term of the supreme court. They were not appeals *in* the supreme court, from the special term or circuit to the general term, which were moved to be dismissed; but appeals from an inferior court *to* the supreme court, not to the general term. The special term is the court, quite as much as the general term is the court; and, in the absence of a statute or rule requiring any particular motion, which should be addressed to the court, to be made elsewhere, it should be made at special term, of course. In the court of common pleas, when the appeal is under chapter V. of the Code, an appeal from an inferior court to the court of common pleas, it is always held that a motion to dismiss on the ground of irregularity should be made at special term (*Griswold v. Van Deusen*, 2 *E. D. Smith*, 179; *Williams v. Tradesmens' Ins. Co.*, 1 *Daly*, 322; *Irwin v. Muir*, 13 *How. Pr.*, 409; 4 *Abb. Pr.*, 133). And that has always been the practice in the supreme court, upon appeals to it from inferior courts (*Suffern v. Lawrence*, 4 *How. Pr.*, 129; and *Bunnel v. Hays*, unreported, but decided at special term in the first district, in 1869, and affirmed on appeal). The practice goes upon this ground, among others, that such an appeal is by petition to the court, not to the general term, or to either other branch of the court; and that the proper place to make a motion in the first instance to dismiss a petition is at special term. In this case, the court passed distinctly on that matter, and decided the practice to be correct, holding that the special term may entertain a motion to dismiss any appeal for irregularity, as a general proposition.

II. The question of regularity or irregularity of these appeals is to be decided without reference to any provision of the Code concerning appeals in civil actions, and neither this court nor the supreme court can

exercise any discretion with reference to amendments, or corrections, which it gets the power from the Code to allow in an action (*Schenck v. Dart*, 22 *N. Y.*, 422). That decision was made in 1860. There were then only the provisions of the Revised Statutes to determine the sufficiency of notices of appeals from the surrogate's decrees and orders like those under consideration. They are 2 *Rev. Stat.*, 610 (part III., ch. IX., art. 3, tit. III.), §§ 105, 107, 108. But, by the *Laws of 1870*, ch. 359, § 12, a new and very important element was introduced concerning appeals from the surrogate of New York county. Those provisions are not mere rules of court which can be disregarded; they are all statutory requirements, which are inflexible, leaving nothing to the discretion of the parties, or of any court. They must all be strictly complied with by the appellant; and neither the supreme court nor this court, sitting as an appellate tribunal, can afford any relief to the appellant who disregards either of them. That was the rule of practice in the court of chancery, to which, previous to the constitution of 1846, these appeals were taken, and it has never been changed (1 *Barb. Ch. Pr.*, 425; *Dayt. on Surr.*, 738; *Bronson v. Ward*, 3 *Paige Ch.*, 189; *Van Slycke v. Schmeck*, 10 *Id.*, 302, 303; *Bank of Monroe v. Widner*, 11 *Id.*, 529). "Where the time for appealing is fixed by statute, if the appeal is not brought within the time allowed by law, the court can not extend the time, even upon an excuse shown, as the lapse of time in that case is an absolute bar to the appeal" (*Caldwell v. Mayor, &c.*, 9 *Paige*, 572, per Chancellor WALWORTH, citing many authorities). "The power of the court respecting the case was exhausted; and the plaintiff had an absolute right to the fruit of his recovery, of which it was not in the power of the court to deprive him" (*Wait v. Van Allen*, 22 *N. Y.*, 321; and see 11 *N. Y.* [1 *Kern.*], 274). And it shows how strictly the chancellor enforced the statute, that

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the rule is well established that, even if the bond is filed within the time limited for taking the appeal, but the sureties are not actually approved by the surrogate until afterwards, the appeal is irregular, and must be dismissed (*Van Slyke v. Schmeck*, 10 *Paige*, 303). The thirty days, limited by the Revised Statutes for appealing from the surrogate's order of April 12, expired May 12; and the three months, so limited for appealing from his decree of April 12, expired July 12, 1871. But no bond was filed with the surrogate; and, though, as authorized by the act of 1870, the surrogate required that, before any appeal should be taken from the order or decree, the would-be appellants should first deposit, under his direction, the amount by it ordered or decreed to be paid, no such deposit was made until July 15, which was more than two months too late to take an appeal from the order respecting allowances, and three days too late to take an appeal from the decree of settlement of the administrator's accounts. It is submitted, therefore, that the notice of appeal, which was filed July 12, was nugatory; that the proceedings never got out of the surrogate's court and into the supreme court; that the appeal was never of any effect for any purpose whatever, even to allow the supreme court to assume such jurisdiction of the proceedings as to attempt to allow the appellants to execute and file the bond afterwards. That court has no powers in the premises additional to those formerly enjoyed by the court of chancery.

III. The decree of the surrogate, made on April 12, 1871, was not, as counsel calls it, a final decree, in the sense that it precluded the surrogate from any further proceedings in the matter in which it was entitled. It was merely a decree of *final settlement* of the accounts to which it refers. The *finality* intended by the term *final settlement*, refers to the conclusive character of the *accounting*, which, being made on citation to all

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parties in interest, is a *final* and conclusive *adjustment* up to that period (*Dayton on Surr.*, 499). Nor does the term *final* settlement there mean that it is the *last* settlement of the administrator's accounts. "A final account may be had whenever there is anything to account for, so that whenever, after any final settlement, other assets come into the executor's hands he may, as to them, have a final settlement, and so, *toties quoties*, as occasion may require" (*Glover v. Holley*, 2 *Bradf. Surr.*, 293). The Revised Statutes, and all the acts of later date bearing on the subject, contemplate proceedings in the surrogate's court, subsequent to such a decree, and the practice of that court affords many instances of proceedings in the matter in which the decree is entitled, which must be, and always are, taken after it is recorded. The act of 1870 (ch. 369, § 12), is itself an instance of a law which necessarily implies orders to be made by the surrogate *in such a matter*, after the decree of final settlement—as it is only by an order so entitled that he can pay over to the rightful owners the money deposited under his direction *in that matter*, to abide the result of an appeal. The statute (*Laws of 1837*, ch. 460, § 2) prescribes exactly what the surrogate's decree of final settlement of an account shall contain—*i. e.*, "a summary statement of the same as the same shall be finally settled and allowed by him," with the declaration, of course, that it is so settled and allowed. Anything else would be out of place, if put in the decree. The decree was perfect without the order, and could be appealed from at any time within three months after it was *recorded* (2 *Rev. Stat.*, 610, § 105). The order for allowances could be made or not, as the surrogate might in his discretion think proper, without reference to whether the decree of final settlement of the accounts had found them correct or incorrect, as rendered by the administrator (*Laws of 1863*, ch. 362,

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§ 8), or whether or not it had decreed that the administrator was still indebted to the estate. And it was a mere order, to be appealed from, if at all, within thirty days after it was *made* (2 *Rev. Stat.*, 610, § 107). It was under section 8, ch. 362, *Laws of 1863*, and ch. 359, section 9, *Laws of 1870*, that the surrogate's order of April 12, 1871, concerning allowances for counsel, was made. And it was made at the time when its recitals could show that everything had been done to establish the right to the amounts allowed,—*i. e.*, after the settlement of the accounts had been made, which could only be by decree *made*, though that decree had not then been recorded. In that respect, though in no other, the practice in the surrogate's court is like that in the common law courts, where the allowances to the successful party for counsel are made, upon motion, by a separate order of the court, after verdict, but before judgment entered. There is no such thing, in the theory or practice of surrogate's courts, as making up and filing at one and the same time all the various proceedings, orders, &c., in a "judgment roll"—nor is there any such thing there as "docketing a judgment," which includes in one statement the aggregate of the several amounts the successful party is entitled to recover from his adversary—verdict, interest, allowances, costs, taxable disbursements, &c. Every order and every decree by a surrogate, must be, and is, dealt with and appealed from, if at all, as a thing by itself and without reference to any other. In this case, the supreme court passed distinctly upon that point, and recognized and approved the practice. The order under consideration in this appeal, therefore, not only was not, but should not have been, a part of the surrogate's decree of final settlement of the accounts of the administrator.

IV. Counsel claims that section 12 of the act of 1870 repealed the provisions of the Revised Statutes

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requiring the bond of one hundred dollars, conditioned for prosecution of the appeal and payment of costs. But the provisions of that section of the act of 1870, are remedial of mischiefs for which the Revised Statutes did not provide. Theretofore, by merely filing the bond for one hundred dollars, an administrator or executor secured a stay of proceedings pending an appeal, and, if so disposed, could, and frequently did, flee the jurisdiction, carrying away all the assets in his hands, and leaving claimants under the surrogate's decree nothing but that bond—though no appellant from a judgment in a civil action could secure a stay of execution without filing an undertaking, under section 335 of the Code, for payment of the amount of the judgment and damages on appeal; even when he had, under section 334, filed an undertaking in five hundred dollars for costs and damages on the appeal. It is to be observed that the deposit which can be required or received by the surrogate is only of the exact sum by him ordered or decreed to be paid, with no margin for costs or damages on appeal, for which the respondent is evidently left to the old bond under 2 *Rev. Stat.* 610, § 108. When, therefore, as in this case, the deposit is required, the claimant under an order or decree of the surrogate is still not so well secured on appeal as is the judgment creditor in any other court, for he has only the bond of one hundred dollars to look to for his costs on appeal,—which are, under section 318 of the Code, the same as costs in an action, and quite certain to exceed one hundred dollars,—and nothing whatever for his interest or other damages for the delay in satisfaction of his claim. Under those circumstances,—as the act of 1870 does not express any repeal of the provisions of the Revised Statutes in question; as it is full, in other sections, of expressions of the intention of the legislature to retain all the pre-existing requirements in reference to appeals; as the

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exaction of a deposit under section 12 is not inconsistent with or repugnant to the requirements of the old law ; and as the two not only may subsist together but are, as far as they go, complementary,—this court cannot *imply* a repeal of 2 *Rev. Stat.* 610, § 108 (*Bowen v. Lease*, 5 *Hill*, 225, per NELSON, Ch. J., citing many authorities).

V. The surrogate's order concerning allowances for counsel was not appealable. It was entirely in his discretion to allow any amount for counsel on the settlement of the accounts, not exceeding ten dollars for each day engaged therein and in preparing therefor (*Laws of 1863*, ch. 362, § 8). There are no cases which assert for one court any right to review the exercise of a discretion vested by law in another, which is not shown to have exceeded its authority. No appeal lies in such a case from one court to another. The principle is always recognized, even in the cases which hold that where a court, which has special terms or circuits, and also has general terms for appeals in the court, exercises at special term or circuit a discretion vested by statute in the court, an appeal lies therefrom to the general term—cases which go upon the theory that, until the appellate branch of the court has been consulted, it cannot be claimed that the court has expressed itself (*People v. New York Central R. R. Co.*, 29 *N. Y.*, 423 ; *S. C.*, 30 *How. Pr.*, 148).

VI. That the consent of counsel to the order of July 12 was not a waiver of the appeal bond, is evident from the fact that the deposit there provided for was merely of the exact amount, with interest, of the sums by the surrogate ordered and decreed to be paid, with no margin for costs and damages on appeal. That consent was, in fact, merely that the deposit required by the surrogate to be made to his credit should be made in the manner and out of the fund in that order mentioned.

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VII. The order dismissing the appeal from the surrogate's order respecting the allowances should be affirmed. It is, in the matters affected by this appeal, a final order in a special proceeding; it affects a substantial right of appellants, and does not involve any question of discretion in the court below (*Code*, § 11, subd. 3; *Tracy v. Bank of Selma*, 37 *N. Y.*, 523; *Maltby v. Green*, 1 *Keyes*, 548).

BY THE COURT.—PECKHAM, J.—The appellants, in attempting to appeal from the decree or order of the surrogate in this matter, entirely omitted to give any bond as security for the respondent's costs upon appeal.

The decree was entered on the 12th of April, 1871, and the appeal attempted to be brought on the 12th of July following.

The respondents moved to dismiss the appeal upon that ground, among others.

The statute is peremptory, that "no such appeal shall be effectual" until that bond be given (2 *Rev. Stat.*, 610, § 108).

This provision not having been complied with, the appeal is ineffectual for any purpose. It is not in the power of the court to grant any relief (*Van Slycke v. Schmenck*, 10 *Paige*, 301; *Caldwell v. Mayor, &c.*, 9 *Id.* 572).

The whole proceeding is under the Revised Statutes, and the provisions of the Code have no application (*Code*, § 471).

The case does not show a waiver of the bond.

The order appealed from is affirmed, with costs.*

* In *DUMESNIL v. SPOTTS*, determined at the same time, the court reiterated this decision, and *Held*, that on dismissing the appeal for such cause, the supreme court had no power to annex conditions, allowing a bond to be filed *nunc pro tunc*, on payment of costs.

This case came before the court on appeal from an order, the facts relating to which appear in the case in the text.

Hoyt v. Terwilliger.

HOYT *against* TERWILLIGER.

*Supreme Court, Second District; Special Term,
March, 1872.*

STAY OF PROCEEDINGS ON APPEAL.

An appeal to the court at general term, from an order overruling a demurrer, does not, without an express stay, prevent the respondent from entering judgment, pending the appeal, and on the expiration of the time allowed to answer.

Motion to vacate a judgment.

The facts in this case appear in the statement preceding the decision in the last. From so much of the order of the supreme court as granted *conditionally* only, not *absolutely*, the motion to dismiss the appeal to that court from the surrogate's decree of final settlement of the accounts, these appellants appealed to the general term, where the order was in that respect affirmed. An appeal was thence taken to this court.

Burton N. Harrison, for appellants,—Insisted upon the argument made by him in the case in our text, to show that the appellants were entitled to an order of the supreme court of absolute dismissal of the appeal from the surrogate's decree, of strict legal right, which the court had no discretion to withhold. Though the order of the general term was an *interlocutory*, not a *final*, order in a special proceeding, it is appealable to this court (*Code*, § 11, subd. 4, as amended in 1870; *Townsend v. Hendricks*, 40 *How. Pr.*, 143; *Matter of Duff*, 10 *Abb. Pr. N. S.*, 210).

Joseph H. Dukes, for respondents.

BY THE COURT.—PECKHAM, J.—The decision in the case of *Jane P. Spotts* decides this case.

The court had no power to annex any conditions to the dismissal of the appeal. No legal appeal having been taken, the dismissal should have been absolute.

The order, so far as appealed from, is reversed, without costs to either party in this court.

N. S. — XII. — 9.

Hoyt v. Terwilliger.

This action was brought by Oscar Hoyt against Phœbe J. Terwilliger. The facts material to the motion are stated in the opinion.

TAPPEN, J.—The defendant demurred to plaintiff's complaint. The demurrer was overruled at special term with leave to answer in twenty days, &c. The defendant appealed in due time to the general term. Pending the appeal, and after the twenty days, the plaintiff entered judgment. The order overruling the demurrer was affirmed at general term, and defendant thereafter moved to set aside the judgment as irregularly entered, upon the ground that the appeal operated as a stay of proceedings.

The appeal was under section 349 of the Code. No stay of proceedings by order was obtained by defendant pending the appeal.

On the motion, the defendant cites the following cases to show that the appeal to the general term operated to stay plaintiff's proceedings: *Trustees of Penyan v. Forbes*, 8 *How. Pr.*, 285; *Stewart v. Saratoga R. R. Co.*, 12 *Id.*, 435; *Valton v. National Loan Association*, 19 *Id.*, 515. The opposite view is held in *Story v. Duffy*, 8 *How. Pr.*, 488; *Hibbard v. Burwell*, 11 *Id.*, 572; *Forbes v. Oakes*, 2 *Abb. Pr.*, 120; *Bacon v. Redding*, 1 *Duer*, 622; *Hicks v. Smith*, 4 *Abb. Pr.*, 285.*

After a demurrer is overruled at special term, an appeal to the general term does not revive or reinstate the demurrer; the appeal does present to the general term, necessarily, the demurrer, so that the appellate court may see whether the court below shall be sustained or reversed; but it is not correct to hold that the appeal of a party reinstates a pleading or proceeding which the court has given judgment against, in the absence of any provision of the Code to that effect.

* Approved in *Christy v. Libby*, 3 *Abb. Pr. N. S.*, 423; and see 21 *How. Pr.*, 515, 518.

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The Code does not provide that an appeal in any of the cases mentioned in section 349 shall stay the proceedings. And the practice under the system previous to the Code is referred to as determining the practice at this time, which seems to require a party appealing, desiring a stay, to apply to the court therefor.

The defendant's motion to vacate the judgment is denied, with ten dollars costs.

PERRY *against* CHESTER.

New York Superior Court; Special Term, March,
1872.

COUNTER-CLAIM.—JOINT AND SEVERAL LIABILITY.—
RELIEF IN EQUITY.

Under the Revised Statutes (2 *Rev. Stat.*, 354, § 18, subd. 6), a set-off was not authorized, of a demand due from the plaintiff to all of several defendants jointly; but by the Code of Procedure (§ 150) if the liability is joint and several, one of several defendants, although sued jointly with other parties to the contract, may avail himself of a counter-claim existing solely in his favor against the plaintiff; and if allowed, it will operate wholly or *pro tanto* as the case may be, as a satisfaction of the plaintiff's claim, and bar a recovery against the remaining defendants.

Where, however, the defendants are jointly and not severally liable, neither under the Revised Statutes nor under the Code can a demand due from the plaintiff to one of the defendants separately be set up, at law, as a counter-claim by all or either of the joint debtors.

An undertaking, in the form usual under the Code of Procedure, given by several mere sureties, without words of severance, is a joint obligation.

Equity will not reform an undertaking so as to make it joint and several instead of joint, where the undertaking itself creates the whole liability and there is no antecedent indebtedness.

*Reversed
53 N.Y. 240.*

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But where the plaintiff is insolvent, equity will allow a counter-claim held by one of two jointly indebted defendants, to be set up and to operate in favor of both defendants.

Demurrer to a counter-claim.

Andrew J. Perry sued Elisha W. Chester and Charles T. Gilbert, in the New York superior court, upon an undertaking given upon an appeal to the court of appeals.

The undertaking recited the recovery of a judgment by Philip Nussbaum against Samuel C. Reed, the affirmance of the judgment by the general term, and an appeal to the court of appeals. The defendants signed the undertaking upon the appeal, and undertook that, if the judgment was affirmed, the appellant would pay the amount directed to be paid by the judgment, and all damages and costs, &c.

The judgment was affirmed, and the right of action upon the undertaking was assigned by Nussbaum to the plaintiff. The action was joint against the defendants, who alone signed the undertaking, and who were joint sureties.

The defendants served a joint answer, and set up as a counter-claim, a judgment recovered by Reed against Nussbaum, for an amount larger than the amount claimed by the plaintiff, and which latter judgment had been assigned to the defendant Chester. Both defendants claimed to set off the judgment, or as much as was necessary, and that the same should be adjudged to be a good and valid counter-claim against the demand of the plaintiff.

The plaintiff replied to the counter-claim as to the defendant Chester, and demurred to it as to the defendant Gilbert, assigning as ground of demurrer that the answer did not state facts sufficient to constitute a defense on the part of the defendant Gilbert, or a defense to any part of the demand of the plaintiff.

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George W. Stevens, for the plaintiff.

E. W. Chester, for the defendants.

MONELL, J.—It was conceded on the argument of the demurrer that the undertaking of the defendants created a joint and *several* obligation; and, therefore, if the counter-claim had been pleaded by the defendant Chester separately, it would have been a defense as to him. And the plaintiff, by replying, has made the further concession that it is available as to him, although pleaded by the defendants jointly.

The demurrer is as to the sufficiency of the answer as respects the defendant Gilbert; it being claimed that the facts pleaded, although a defense as to Chester, are not a defense as to his co-defendant, either jointly with Chester, or otherwise.

If the obligation of the defendants is *several* as well as joint, and a several judgment can be had, then the counter-claim is available as a defense, under section 150 of the Code, which provides that it “must be one existing in favor of a defendant, and against a plaintiff, between whom a *several* judgment may be had in the action.”

Upon such an obligation, the obligors could be sued jointly or separately, and a judgment recovered against both, or against one only. In separate actions, either could make as many defenses as he might have; and so in a joint action, either could plead a counter-claim due to himself; and if sufficient to satisfy the plaintiff's demand, it would be available to his co-defendant as a payment, leaving the question of contribution to be settled between the defendants, in another action.

The provision of the Code in this respect differs from the Revised Statutes concerning set-off (2 *Rev. Stat.*, 354, § 18, subd. 6), which restricts the latter to a

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demand due to all the defendants *jointly*. Under the Code, therefore, if the liability is *joint* and *several*, one of several defendants, although sued jointly with other parties to the contract, may avail himself of a counter-claim, existing in his favor against the plaintiff; and, if allowed, it will operate, wholly or *pro tanto*, as the case may be, as a satisfaction of the plaintiff's claim, and bar a recovery against the remaining defendants. There can be but one satisfaction, and the allowance of a counter-claim will be treated as a payment by one of several jointly and severally liable, entitling him to contribution from the remaining obligors.

This doctrine was applied, substantially, in *Parsons v. Nash* (8 *How. Pr.*, 454); in *Briggs v. Briggs* (20 *Barb.*, 477); and in *Newell v. Salmons* (22 *Id.*, 647), where it was held, that where there is a *several* as well as a joint liability, a counter-claim existing in favor of one of several defendants is a defense as to all. But in all these cases, the right to counter-claim is confined to the *several* liability of the defendants, and these decisions do not, as they could not, include cases of exclusively *joint* obligation, in which latter case, neither under the Code nor the Revised Statutes, can such a defense be set up by all or either of the joint obligors.

The undertaking executed by the defendants in this case creates a *joint*, and not a *several* liability. It is "we" undertake, and there are no words of severance. Where an obligation is undertaken by two or more, it is the presumption of law that it is a *joint* obligation; and if a different responsibility is intended, there must be words to indicate such intention (1 *Pars. on Cont.*, 11), or at least such clear extrinsic evidence of it, as will authorize a contradiction of the written instrument. Even this, however, is doubted (*Id.*), and the letting in of such evidence seems to be restricted to relief in equity to correct mistakes (1 *Story Eq.*, § 162). In such cases it will sometimes be presumed from ex-

trinsic facts and circumstances, that an obligation by its terms joint only, was intended to be joint and several (*Id.*). Thus a joint loan of money to two obligors was deemed sufficient to reform a joint bond and make it joint and several, upon the presumption, that as the debt was joint, it was the intention that the obligation should attach equally to all, and that could be done only by making the bond *several* as well as joint (*Id.*). But, as stated by Sir WM. GRANT, in *Sumner v. Powell* (2 *Meriv.*, 35, 36), "when the obligation exists only in virtue of the covenant, its extent can be measured only by the words in which it is conceived." And he instances a partnership debt, treated *in equity* as the several debt of each, for the reason, that all the partners had a benefit from the credit. This restriction to a mere power in a court of equity to reform an obligation, confines the rule to cases where the parties are the equal beneficiaries in the consideration which sustains the obligation, and not where their relations are various and different. Hence, a court of equity will not reform a bond against a mere surety, so as to make it several as to him, upon the presumption of a mistake from the nature of the transaction, but will require positive proof of an express agreement by him that it should be several as well as joint (*Weaver v. Shryock*, 6 *Serg. & R.*, 262). And in another case (*Richardson v. Horton*, 6 *Beav.*, 186), where the obligation did not grow out of any antecedent liability in all or *any* of the obligors to do what they have undertaken (as a bond of indemnity for the acts or debts of third persons), it was said that a court of equity will not by implication extend the responsibility from that of a joint to a joint and several undertaking. See, also, *Ward v. Webber* (1 *Wash.*, 274; *Harrison v. Field*, 2 *Id.*, 136).

The implication of law that a several as well as a joint liability was intended, arises only where all have received the benefit of the loan or credit, or were in

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some way antecedently liable ; and in no other case will a court of equity give relief, without clear proof of an express agreement to create a different liability. And when parties to a joint bond are shown to be mere sureties or indemnitors, not having received any benefit from, or been in any manner connected with any antecedent liability, the court will not enlarge or change the obligation.

In the case now before me, the defendants were mere *sureties*. They were not parties to the action ; had incurred no previous liability, and had received no benefit from the subject which was antecedent to this suretyship. There can, therefore, be no presumption or implication raised by any extrinsic fact or circumstance of any intention to create a different contract or liability than is expressed in the instrument they signed. And as that instrument by its terms creates a joint and not a several liability, it must remain as it is, until it is made by the judgment of a court of equity to express a different agreement.

Being, as I have endeavored to show, a joint liability only, it follows there can be no separate judgment, and the counter-claim set up in the answer, therefore, is not allowable under the Code, and constitutes no defense, unless upon the application of equitable principles, which may be invoked under some of the allegations of the answer, the court can, independently of the Code, and of the Revised Statutes, make the judgment assigned to Chester available, as an equitable set-off.

It is alleged in the answer that the defendant Chester acquired the judgment against Nussbaum, prior to the assignment from Reed to the plaintiff, of the undertaking in suit ; and, therefore, that the plaintiff took subject to all the equities existing between the assignor and Chester. And there is the further allegation, up-

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on information and belief, *that Nussbaum is insolvent.*

A court of equity is not confined to the terms of the statute of set-off, but can allow a set-off to be made in a case not within the statute, where, from the peculiar circumstances of the case, justice cannot be obtained in a cross action (*Lindsay v. Jackson*, 2 *Paige*, 581). And the insolvency of one of the parties has been deemed sufficient ground for the exercise of this equitable jurisdiction (*Simpson v. Hart*, 14 *Johns.*, 63). In that case, the plaintiff sought to set off a judgment against two, one of whom had a judgment against the plaintiff, it being alleged that the two were insolvent. Judge SPENCER, in delivering the prevailing opinion, says : "There is no force in the objection that the judgments are not in the same right ; it is settled 'that although the demands, as being joint and several, are not, strictly speaking, due in the same right, yet, if the legal or equitable liabilities, or claims of money become vested in, or may be urged against one, they may be set off against separate demands, and *vice versa*' " (See *Mitchell v. Oldfield*, 4 *Term R.*, 123).

Mr. STORY, in his *Equity Jurisprudence* (2 *Eq. Jur.*, § 1437), states the rule a little more narrowly. He says courts of equity, following the law, will not allow a set-off of a joint debt against a separate debt, and conversely, of a separate debt against a joint debt, except under special circumstances creating an equity which will justify the interposition ; and he seems to require a clear series of transactions, establishing that there was a joint credit given on account of the separate debt. And the chancellor, in *Holbrook v. Am. Fire Ins. Co.* (6 *Paige*, 220), sustained the vice-chancellor, who expressed the opinion that the objection that the joint debt could not be set off against a separate debt, could be obviated by proof of the actual re-

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lations of the parties, — namely, whether one was merely surety, or whether they were jointly borrowers.

In the recent case of *Smith v. Felton* (43 *N. Y.*, 419), the facts authorized the same distinction to be drawn. The bank held the note of one partner, indorsed by the other, but which had been discounted for the firm. The bank having become insolvent, passed into the hands of a receiver, who brought suit on the note, and a debt due to the firm was allowed as an equitable set-off. The court, however, made no such distinction, but recognizing the insolvency of the bank as sufficient ground for the allowance of the set-off, put its decision on the ground "that justice and equity demand that the debts should be set off against each other, rather than that the defendants should be made to pay the note, and left to rely upon the estate of an insolvent debtor for the payment of the debt due them."

The defendant Chester certainly has a clear equity in his favor, of which he should not be deprived merely because he is jointly liable with another, who has no interest in the set-off. Equity demands that the set-off should be made available to him, and, if it is allowed, it must operate, as I have before shown, as payment, in whole or in part, of the plaintiff's claim.

This reasoning leads to sustaining the answer in behalf of both the defendants, and as stating facts sufficient to constitute a defense for both, and, therefore, overrules the demurrer.

The views I have expressed are quite different from those of either counsel on the argument, which related wholly to the construction of section 150 of the Code, under the concession that the liability of the defendants was several as well as joint.

The defendant Gilbert must have judgment upon the demurrer with costs, with leave to the plaintiff to withdraw the demurrer and reply to the answer, within twenty days, on payment of costs.

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*affirmed
as ny. 245*

WEHLE *against* BUTLER.

New York Superior Court ; General Term, November, 1871.

SEPARATE LIABILITY OF WRONGDOERS.—EFFECT
OF SUBSEQUENT VALID EXECUTION ON
ILLEGAL ATTACHMENT.

Where a simultaneous levy was made under thirteen attachments, and all of the attaching creditors actively assisted in removing plaintiff's property to defendants' store, and no separation was made of plaintiff's goods under the different attachments,—*Held*, that on all the attachments being set aside, defendants, who were a portion of the attaching creditors, were liable, separately as well as jointly, for a conversion of plaintiff's property.

Evidence of payment, or of application of the fund in suit to plaintiff's benefit, cannot be introduced under a general denial.

If a defendant, when sued for a conversion of goods, sets up a subsequent valid sale, on an execution in favor of the defendants, and against the plaintiff, this constitutes a defense, and does not go in mitigation of damages; and must be specially pleaded. Evidence of it cannot be introduced under a general denial.

Appeal from judgment entered upon the verdict of a jury.

Louisa Donai Wehle sued Henry L. Butler, Jonathan J. Broome and Oliver M. Clapp, copartners in business, for the conversion of plaintiff's goods.

Plaintiff's complaint alleged that she was a merchant, having had a profitable business; that defendants were copartners; that by splitting up an alleged demand against plaintiff, and by a false and fraudulent affidavit, defendants procured attachments against

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her property, to issue out of the marine court, seized her goods at midnight and removed them and still detained them, and destroyed her business; and that plaintiff was at great expense in procuring the attachments to be vacated; for all of which she claimed damages.

The answer of the defendants contained a general denial.

Upon the trial it appeared that on December 8, 1869, six warrants of attachment were issued by one of the justices of the marine court at the instance of the defendants Butler, Broome and Clapp, as alleged creditors of the plaintiff, and seven other warrants in favor of Spelman & Sons and Haviland, Lindsley & Co., other alleged creditors of the plaintiff, against the property of the plaintiff; that on the same day the thirteen warrants were received by the sheriff, that the latter, accompanied by the defendant Henry L. Butler, of defendants' firm, Mr. Haviland and Mr. Lindsley, of the firm of Haviland, Lindsley & Co., Mr. Holbrook, representing the firm of J. B. Spelman & Sons, and other parties, proceeded to plaintiff's store after ten o'clock in the evening of the same day, served all the attachments at the same time, seized the entire contents of plaintiff's store, and caused them to be carted in the middle of the night to a stable in Thirty-first-street, whereby plaintiff's business was completely broken up. All the parties named assisted in the removal of the goods to the stable, Butler, Holbrook and Lindsley following the carts to see that nothing got lost. The goods were subsequently taken from the stable to defendants' store on Broadway, where they remained nominally in the custody of the sheriff for about six weeks.

It also appeared that the sheriff made a separate return to each of the six attachments issued at the instance of the defendants, certifying upon the back of

each of them that, by virtue of the within attachment, he did attach and take into his custody the goods and chattels of the said Wehle, and made an inventory of the same. The inventory read as follows :

“Inventory of property attached December 8, 1869.

“Dress goods.

“Domestic goods.

“Flannels.

“Fixtures, &c.

“Value at about \$1000.”

A similar return was made to each of the other attachments issued in favor of the other creditors.

On December 13, 1869, on a motion to vacate founded on the attachments, the return of the sheriff thereon, and the affidavits on which the attachments were issued, the six attachments obtained by the defendants were vacated and set aside by order of the marine court, with costs to the defendant named therein (Wehle). At the same time the other seven attachments in favor of the other creditors were vacated, with costs, for irregularity.

Plaintiff thereupon demanded a return of her goods, but defendants refused, and the goods were finally sold on January 28, 1870, at sheriff's sale, under some execution which the defendants issued. Defendants' counsel offered to prove (it being assumed and agreed that the witness and the papers were in court) “that after these actions had terminated in the marine court, and before the commencement of this action, actions were commenced in the court of common pleas, between the same parties, and against the property of said Louisa Donai Wehle, duly and regularly issued therein, on the ground that the defendant in that suit (the plaintiff in this suit) had disposed of property to defraud creditors ; and that thereunder the goods in question were seized by the sheriff ; that a motion was made to vacate those attachments, and denied ; and that the said at-

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tachments stand to-day," which was objected to, except the fact that the actions in the marine court had terminated, which was admitted by both sides.

The court excluded the evidence, and defendants excepted.

The value of the goods taken was variously estimated from two thousand dollars to ten thousand dollars, and on that point the evidence was highly contradictory. Defendants showed, among other things, that at the sheriff's sale the goods brought two thousand one hundred and eighty-seven dollars and ninety-four cents. The plaintiff, in rebuttal, recalled a witness who had personal knowledge of the value of the goods in question, and put the following question :

"Q What would the goods that you have on this list (sheriff's list) sell for, in your store, at retail?"

The defendants objected, but the court admitted the question, and defendants excepted.

At the close of the testimony on both sides, defendants' counsel asked the court to direct a verdict for the defendants. The court declined, and defendants excepted.

The court charged the jury that the only question for them to consider was the value of the goods taken from the plaintiff under defendants' attachments, and that should be the fair retail market value of the goods on December 8, 1869, with interest to present day.

Defendants excepted to that part of the charge wherein the court instructed the jury that the only question for them to consider was as to the value of the goods.

The jury rendered a verdict for the plaintiff for four thousand nine hundred and fifty dollars.

Defendants moved for a new trial upon the minutes of the court, which motion was denied, and defendants excepted.

Judgment was entered upon the verdict in favor of

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the plaintiff for five thousand two hundred and eighty-seven dollars and forty-four cents, and from that the defendants appealed.

C. Bainbridge Smith, for the defendants, appellants.

Charles Wehle, for the plaintiff, respondent.

BY THE COURT.*—FREEDMAN, J.—The appeal being from the judgment merely, the only questions open for review are the questions of law arising upon the exceptions taken by the defendants upon the trial.

Under the issues raised by the pleadings, and the testimony given on the trial on both sides, the evidence as to the retail value of the goods taken was properly admitted. It was, under the circumstances, competent, although by no means conclusive. A question of a more serious character would arise upon that part of the charge in which the court laid down the rule that the value of the goods taken should be the fair retail market value of the goods on December 8, 1869, with interest thereon, if the defendants had taken a proper exception to it at the time. But as they acquiesced in it by excepting only to so much of the charge as instructed the jury that the only question for them to consider was as to the value of the goods, they cannot now be permitted to urge for the first time that the court erred in that respect.

The same remarks apply to the attempt of defendants' counsel to convince us upon the argument that the court below erred in directing the jury to allow interest on the value of the goods, for the reason that in all cases of this nature interest constitutes an item of damage in the discretion of the jury. But, independent of that consideration, it may be well to point

* Present, BARBOUR, Ch. J., MONELL and FREEDMAN, JJ.

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to the fact that the proposition here contended for has been expressly repudiated in this State. "Interest on the value at the time of the conversion," says JOHNSON, Ch. J., in delivering the opinion of the court of appeals in the case of *Andrews v. Durant* (18 *N. Y.*, 496), "is as necessary a part of complete indemnity as the value itself. There is no sense in the idea that interest is any more in the discretion of the jury than the value."

Two questions, therefore, remain to be considered. 1. The effect of the simultaneous levy under the thirteen attachments upon the separate liability of the defendants in this action; and, 2. The admissibility or non-admissibility of the evidence, showing a subsequent seizure under process claimed to have been valid, which was offered by the defendants and rejected by the court.

As to the first. The action was one sounding in tort. It was trespass, for wrongfully taking and carrying away plaintiff's goods, and breaking up her business. The attachments under cover of which the goods were taken in the first instance, having been set aside for irregularity, they afford no shield or protection whatever for such taking to the creditors who procured them to be issued. Such protection extends only to the officer while acting under them in the discharge of his public duty. The moment they were set aside the creditors stood as though no process had ever been issued, and became trespassers *ab initio* (*Lyon v. Yates*, 52 *Barb.*, 237; *Kerr v. Mount*, 28 *N. Y.*, 659). And as the evidence plainly establishes that all the attaching creditors actively participated in the seizure and removal of plaintiff's *entire* stock at one and the same time, without separating their respective proceedings, and there being no evidence from which the extent of the separate liability of any one of them can be ascertained, they must, in the aspect of the case in which

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the question is presented by the appellants, be deemed, for the purpose of this case at least, to have been joint tortfeasors, and, as such, their liability is joint and several, and enforceable accordingly at plaintiff's election (*Creed v. Hartman*, 29 *N. Y.*, 591 ; affirming *S. C.*, 8 *Bosw.*, 123 ; *Kasson v. People*, 44 *Barb.*, 347).^{*} In such case, an answer pleading a former recovery against one, to be good, must also aver actual satisfaction (2 *Phil. on Ev.*, 5 ed., 114 (*134) ; *Wies v. Fanning*, 9 *How. Pr.*, 543).

In the case at bar no such issue was raised by the pleadings, and, if there had been, there was no evidence to support it. On the contrary, the evidence showed not only that the defendants were very active in enforcing the levy and removal of the goods in the unusual and oppressive manner in which they were seized and removed, but, in addition, that all of plaintiff's goods were taken to defendants' store, kept there for weeks after the attachments had been vacated and the return of the goods demanded, and finally sold for defendants' exclusive benefit, under an execution subsequently procured by them in some way which is not specified. The bare fact of the existence, and simultaneous, but fruitless, levy of the attachments issued by the other creditors, cannot, therefore, be made available to the defendants in this action, in any aspect of the case.

As to the second. To properly determine this question, it is necessary to inquire whether a tortfeasor, who has taken property by a wrongful act, can subsequently apply the same on legal process issued in his own favor and against the owner, and, if he cannot, under what circumstances and to what extent he may be permitted to show that the same property was taken from him again by a third party.

^{*} See, also, *Chambers v. Clearwater*, 41 *Barb.*, 200 ; affirmed in 1 *Keyes*, 310.

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In *Hammer v. Wilsey* (11 *Wend.*, 91), it was held, that a return of property illegally taken, though accepted by the owner, is no bar to an action; the return and acceptance being available only in mitigation of damages. But, even for that purpose, it is not admissible to show that property illegally taken was subsequently applied, without the assent of the owner, in satisfaction of a valid execution against him. In *Otis v. Jones* (21 *Wend.*, 394), some horses taken under an attachment issued in an action, which the plaintiff found himself compelled to discontinue, were subsequently sold under an execution issued in another action for the benefit of the same party. The judge at the circuit ruled that the effect of the sale, which was legal, was to mitigate the damages, and prevented the plaintiff from recovering any more than nominal damages. But, on appeal, the court repudiated this doctrine, reaffirmed the principle enunciated in *Hanner v. Wilsey* (11 *Wend.*, 91), and expressly held, that a wrongdoer cannot discharge himself by any act of his own *without the assent of the injured party*. By procuring subsequent sale on legal process, the defendant cannot be better off than he would be if he had offered to restore the property to the plaintiff. And yet no tender will, at the common law, either bar an action for a tort, or take away the right to full compensation in damages. The decisions in *Lyon v. Yates* (52 *Barb.*, 237), and *Peake v. Lemon* (1 *Lans.*, 295), are to precisely the same effect.

A distinction, however, was made whenever it appeared that the property was taken again from the trespassers, without any agency or connivance on his part, and applied to the owner's use, although without the latter's consent, by the act of a *third* person *and* the operation of law. In this class of cases the jury were permitted to take the taking of the goods by such third party and their application to plaintiff's use into

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the account in estimating plaintiff's damages. But at the same time it was deemed necessary in every instance, that it should appear that the subsequent taking by such third party was independent of any agency on the part of the defendant and that there was in point of fact, an application to plaintiff's use (*Higgins v. Whitney*, 24 *Wend.*, 379; *Sherry v. Schuyler*, 2 *Hill*, 204; *Ball v. Liney*, 44 *Barb.*, 505; *Ward v. Benson*, 31 *How. Pr.*, 411).

Now, the offer made by defendants to prove "(it being assumed and agreed that the witness and the papers are in court), that after these actions had terminated in the marine court, and before the commencement of this action, actions were commenced in the court of common pleas, between the same parties, and against the property of said Louisa Donai Wehle, duly and regularly issued therein, on the ground that the defendant in that suit (the plaintiff in this suit) had disposed of property to defraud creditors; and that thereunder the goods in question were seized by the sheriff; that a motion was made to vacate those attachments and denied, and that said attachments stand to-day," was rather vague. It may be questioned whether the words "between the same parties" mean only the parties to this action or all the creditors named in the first thirteen attachments and the plaintiff herein. Supposing the first to be the case, it is quite clear, upon the authorities examined, that the defendants cannot be permitted to defend, either in whole or in part, the trespass committed by them by proof of a subsequent appropriation of the property to plaintiff's use, but without her consent, under an execution procured in their own favor. And if the second is assumed to be the case, the same objection seems to apply with equal force to all the attaching creditors. Having been jointly concerned, for the purpose of this action at least, in the commission of a wrong, and being jointly

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and severally liable therefor at plaintiff's election, they were all alike incapacitated from making a subsequent legal appropriation of plaintiff's property either for their joint account or for account of any one of their number, without plaintiff's assent. To hold otherwise would be to hold, in effect, that one of a number of joint tortfeasors may escape liability by inducing any one of his confederates to do what he is not permitted to do. But inasmuch as the testimony given on behalf of the defendants shows that the defendants were, as already stated, the only ones that derived any benefit from the taking of plaintiff's property, and that there has been no appropriation of the same in point of fact, to plaintiff's use under legal process subsequently procured by the other creditors, and inasmuch as the court below charged the jury to consider the value of the goods taken from plaintiff under *defendant's* attachments, and the jury must be presumed to have found in accordance with that instruction, it is unnecessary to pursue this line of inquiry any further.

Another grave objection to the receipt of the proposed evidence in this action is, that even if its sufficiency as a subsequent legal appropriation to plaintiff's use, as well as its competency, be assumed, it is not pertinent to any of the issues raised by the pleadings, because not pleaded. Defendant's counsel, it is true, strenuously argued that it should have been received, at least in mitigation of damages, and that for that purpose it did not require being pleaded. But on a critical examination, this claim will also be found to be untenable. Mitigating circumstances do not, and never did amount to a defense to any part of plaintiff's claim. They may diminish the *nominal* claim made by him, but do not diminish the *real* claim, or reduce it below what it was originally. A defense, as understood in law language, on the other hand, is a full answer to whole or to some part of plaintiff's de-

mand. Under the old practice, both were admissible under the general issue, without being pleaded, and this fact led to a frequent confusion of the distinction, to some extent at least, between partial defenses and circumstances of mitigation (*Harter v. Crill*, 33 *Barb.*, 283).

Now, the evidence, which was proposed and excluded in this case, did not in any wise tend to mitigate the trespass or to diminish plaintiff's claim, whether nominally made too large or not, for in such case, the law itself prescribes the true measure, and a certain and definite measure of damages; it did not consist of circumstances which existed at the time of the commission of the trespass, and possess a mitigating or extenuating character that as such could be considered in the estimation of plaintiff's loss, which had then fully accrued; but it was offered for the purpose of bringing about, when received, a reduction, not of plaintiff's claim, but of plaintiff's recovery. Whether it be considered, therefore, as a set-off, or as matter of avoidance, or in bar, in full or *pro tanto*, it was equally new matter purporting to constitute at least a partial defense, and as such should have been set up in the answer (*Code*, §§ 149, 150).

It is indeed somewhat remarkable that no case can be found in the books in which this precise question has been determined. The cases of *Higgins v. Whitney* and *Sherry v. Schuyler*, above cited, occurred before the Code. In *Ball v. Liney* (44 *Barb.*, 505), the answer did contain all necessary averments showing a full and complete appropriation to plaintiff's use; and that the pleader must have been equally careful and precise in *Ward v. Benson* (31 *How. Pr.*, 411), is apparent from the report of the whole case. But if any authority be needed, it will be found that the principle of the decision of the court of appeals in *McKyring v. Bull* (16 *N. Y.*, 297), is fully applicable to the present case.

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SELDEN, J., in delivering the opinion of the court in that case,—in the course of which he exhaustively reviewed the decisions of the English courts upon this subject, as well as the changes effected by the Code,—concludes as follows: "My conclusion, therefore, is that section 149 of the Code should be so construed as to require the defendants, in all cases, to plead any new matter constituting either an entire or partial defense, and to prohibit them from giving such matter in evidence upon the assessment of damages, when not set up in the answer. Not only payment, therefore, in whole or in part, but release, accord and satisfaction, arbitrament, &c., which may still, for aught I see, be made available in England in mitigation of damages, without plea, must here be pleaded." See, also, *Foland v. Johnson*, 16 *Abb. Pr.*, 235; *Beckett v. Lawrence*, 7 *Abb. Pr. N. S.*, 403; *Bush v. Prosser*, 11 *N. Y. [1 Kern.]*, 347 (352); *Smith v. Reeves*, 33 *How. Pr.*, 183. The evidence embraced in defendants' offer was properly excluded, therefore, as not pertinent to the issues raised by the pleadings.

It appearing as the final result of this examination that none of the exceptions taken by defendants can be sustained in law, the judgment appealed from must be affirmed with costs.

BARBOUR, Ch. J., concurred in the foregoing opinion.

MONELL, J., concurred in the conclusion upon other grounds.

Matter of Eager.

MATTER OF EAGER.

*Court of Appeals, 1871.*ASSESSMENT FOR LOCAL IMPROVEMENT.—PETITION TO
VACATE.—LEGAL IRREGULARITY.—RE-
TROACTIVE STATUTES.

Under a resolution of the common council of New York city,—directing a street to be paved, and “cross-walks to be laid or relaid at intersecting streets, under the direction of the Croton Aqueduct Department,”—it is not necessary that cross-walks should be laid at all the intersecting streets, but it is sufficient if they are laid at those intersections at which, in the judgment of the department, they are necessary and proper.

Under section 38 of the New York city charter of 1857,—which provides that all contracts made by authority of the common council shall (except in certain cases) be made after advertisement inviting proposals,—*Held*, that when an improvement is ordered by the common council which embraces several kinds of work capable of being separately performed by different parties, some of which are patented and others not patented, separate proposals should be invited for that part of the work which is not patented, and for which there can be competition.

Where, therefore, the laying of Nicolson pavement (a patented article), and stone cross-walks (not patented), was done under one contract, which had been let after proposals for Nicolson pavement only had been invited,—*Held*, that the contract was unlawfully entered into, and an assessment for such work was vacated.

Quere, as to whether the common council, under section 38, may lawfully contract for a patented article.

It is lawful to allow the contractor, in addition to the sum fixed in the contractor's proposal, a sum equal to the inspector's fee for each day less than the contract time within which he completes the work.

The collector of assessments in New York city may charge a commission of two and a half per cent. on the whole sum paid by him into the bureau of assessments, and may, therefore, compute the two and a half per cent. not only on the other expenses of the work, but also on his own commission.

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The principle upon which an assessment is made, if erroneous, is not a "legal irregularity" within *Laws of 1858*, p. 574, § 2, ch. 338, and is not the subject of review in a petition under that statute. The act of 1870, ch. 383, in regard to assessments in New York city, has not a retroactive effect in a case heard before the act passed.

Proceeding under the *Laws of 1858*, p. 574, ch. 338, § 2, to vacate an assessment in New York city.

The proceedings on the hearing, and the decisions at special and general terms are reported in 10 *Abb. Pr. N. S.*, 229; *S. C.*, 58 *Barb.*, 557; 41 *How. Pr.*, 107.

At general term the order vacating the assessment was affirmed, on the ground that the extra allowance to the contractors, for finishing the work before the time fixed for its completion, was illegal.

From that order the mayor, aldermen and commonalty appealed to the court of appeals.

A. J. Vanderpoel, for the appellants.

Abraham R. Lawrence, for the respondents.

BY THE COURT.—RAPALLO, J.—These proceedings were instituted in the supreme court under the act of 1858 (*Laws of 1858*, p. 574) for the purpose of vacating assessments upon the property of the respective petitioners for paving parts of Irving-place, Nineteenth-street, and Seventeenth-street, with Nicolson pavement.

The resolutions of the common council under which the several improvements in question were made, were all in the same form, and directed that the streets therein mentioned "be paved with Nicolson pavement where not already paved with Belgian pavement, and that cross-walks be laid or relaid at intersecting streets, under the direction of the Croton Aqueduct Department, and that an ordinance which followed each of the resolutions be adopted." The ordinance provided that the work should be done by assessment.

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It appears from the proofs taken by the petitioners, and upon which the hearing was had at special term, that, in performing the work directed by these resolutions, stone cross-walks were not laid at all the intersecting streets embraced within the several areas directed to be paved, but only at those places where the intersecting streets were paved with Belgian or concrete pavement.

For instance : Irving-place, from Fourteenth to Twentieth-street, is intersected by five streets. Three of these were paved with Belgian or concrete, but at Sixteenth and Nineteenth-streets, which were directed to be paved with Nicolson pavement, there were no cross-walks laid, but the Nicolson pavement was continued over the space where there had previously been cross-walks. It was proved, on the part of the city, without contradiction, that it was injurious to the Nicolson pavement to interrupt it at intervals by cross-walks of stone, and that the contractor was directed to lay cross-walks parallel to the work, and transversely at the commencement and termination of the work, but at no other places.

The petitioners claim that under the resolution of the common council cross-walks should have been laid at all the intersecting streets, and that as much of the Nicolson pavement as covers the spaces where the cross-walks should have been laid, was unauthorized, and that the cost of such pavement being embraced in the assessment, vitiates the whole assessment,

The first three specifications of alleged irregularities set forth in the petition, consist of this objection, stated in different forms.

The court below seem to have supposed that the objection was that the expense of cross-walks was included in the assessment, though none were laid ; and the case was disposed of at general term on that ground. But such was not the objection, nor was

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there any allegation or proof that any cross-walks were charged for which were not laid.

The objection made by the petitioners was to the charge for Nicolson pavement in those places where it was claimed that there should have been cross-walks.

We do not think that the terms of the resolutions of the common council are so specific in this respect as to require that cross-walks should be laid at every intersection, whether needed or not. The evidence shows that such cross-walks were rather injurious than beneficial at those points where the intersecting streets were laid with the Nicolson pavement, and that their cost was nearly three times as much per superficial yard as that of the pavement. Clearly, the petitioners have not been aggrieved or injured by the omission, and unless the language of the resolutions is so clear as not to admit of any other construction, we ought not to hold that the city was bound to incur this useless additional expense.

The language of the resolutions is that the street be paved, &c., and cross-walks laid and relaid at intersecting streets, under the direction of the Croton Aqueduct Department; the resolutions do not say in terms that they shall be laid at all the intersections, and, in view of the character of the pavement, as shown by the evidence, we think that the resolutions were substantially complied with by laying cross-walks at those intersections at which, in the judgment of the department, they were necessary or proper.

There is no proof that this was not done, and we think, therefore, that the objection presented by the first three specifications is untenable.

It is further objected, however, that, although cross-walks as well as pavement were required by the resolutions, and some were contracted for and laid, and new bridge-stones furnished, and charged for, to amounts exceeding two hundred and fifty dollars in

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each case, there was no advertisement for sealed proposals for such cross-walks or bridge-stones, as required by section 38 of the charter of 1857.

This objection is presented by specifications 5 and 6 of the petitioners.

The advertisement published and read in evidence, called for sealed proposals for the construction of Nicolson pavements in the localities described in the resolutions, and stated that the plans for the works might be seen and specifications and forms for the bids obtained on application at the office of the Croton Aqueduct Board.

The advertisement did not mention cross-walks, or bridge-stones, and it is urged that it did not give notice that such bridge-stones or cross-walks were required. That although they were mentioned in the specifications in the office of the Croton board, to which attention was invited, yet that there was nothing in the advertisement to indicate that cross-walks would be embraced in the specifications or to induce parties to examine them with the view of bidding for such cross-walks. It might, perhaps, be an answer to this objection that contractors acquainted with the business of laying pavements would know that cross-walks at some points would be a necessary part of the work, and, therefore, that the advertisement for pavement embraced cross-walks as incidental thereto. But in this case, there is an element which presents a more serious difficulty. It appears that the Nicolson pavement is a patented article which could be furnished by only one party, and that there was necessarily but one bidder for the contract. The objection taken in the respondent's points that inasmuch as there can be no competition in such patented articles, the city has no right, under the charter, to contract for them, is not taken in these objections, and is not properly before us ; but the objections which are taken in the petitions to

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the want of a sufficient advertisement for proposals for the cross-walks or bridge-stones ordered by the resolutions, does raise the question whether, when an improvement is ordered by the common council which embraces several kinds of work capable of being separately performed by different parties, some of which works are patented and others not patented, separate proposals should not be invited for that part of the work which is not patented and for which there can be competition.

It seems to us that the intent of section 38 of the charter cannot be carried into effect without such a separation.

Even if we shall hold that patented articles may be contracted for by the city, notwithstanding the impossibility of competition, we ought to stop there and not go to the length of sanctioning a practice whereby competition may be prevented by unnecessarily coupling a work not patented with one which is patented, and advertising for an entire proposal for the whole. In the former case, there is no alternative between incurring the hazard of the abuses which may result from the absence of competition, and absolutely depriving the public of the benefit of useful improvements and inventions. But in the latter case, competition is unnecessarily excluded as to a portion of the work, and as to that portion, the spirit of section 38 is completely evaded.

We are, therefore, of opinion that a fair and substantial compliance with that section requires that when the work is separable, separate proposals should be invited by advertisement for that portion which is not the subject of a patent, so that persons other than those controlling the patent may be bidders.

In this respect, the advertisement in the present case was defective. Even if the term pavement be sufficient to embrace the appropriate cross-walks, yet

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the advertisement did not authorize any separate proposals for the cross-walks, and no persons but those who had it in their power to propose for the pavement could be bidders for the cross-walks. By this mode of advertisement, the patentees of the pavement were secured against competition for the cross-walks or bridge-stones, as well as for the patented pavement, and were enabled, had they chosen to do so, to charge any price, however exorbitant, for articles which under a different mode of advertising would have been open to competition.

It does not appear that in this case the contractors availed themselves of the opportunity thus afforded of taking an undue advantage; but a system which would open to unscrupulous parties such an avenue to fraud should not be sanctioned, and is diametrically opposed to the spirit of section 38 of the charter.

Our conclusion is, that there was no regular or sufficient advertisement for proposals for the cross-walks and bridge-stones, and that this irregularity invalidated the assessment.

The fourth specification of the petitioners relates to a *per diem* allowance made to the contractors pursuant to one of the provisions of the contract, for completing the work in a shorter time than that limited by the contract.

Section 38 of the charter of 1857 provides, that when proposals are advertised for, the terms of the contract shall be settled by the corporation counsel, as an act of preliminary specification to the bid or proposal.

Contracts containing specifications were prepared in accordance with that provision, and an examination of them invited by the advertisement, as has already been shown.

The bids were therefore made with reference to this

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provision of the contract, and it was proved upon the hearing, that such is the usual practice.

Thus, the time for completion of the work is an essential part of the bid, and thus when bids are equal in other respects, the party offering to do the work in the shortest time, is treated as the lowest bidder.

The daily allowance under each contract for time saved, is precisely equal to the daily expense of inspecting the work, and the same sum which the city pays to the contractor for shortening the time, it saves in inspectors' fees.

By another stipulation of the same contract, if the prescribed time is exceeded by the contractor, he is bound to pay the inspectors' wages during the excessive time. The time, therefore, within which the work is to be completed, affects its price, and within the bounds fixed by this contract, I can see no objections in ordinary cases, to graduating the price to be paid according to the time allowed for performing the work.

This provision for allowance, it is true, might, in the case of a patented article, be used as an instrument of fraud ; but that result flows from the inherent difficulties of applying the competitive system to such cases, and not from the method of adjusting the price.

The danger lies in the impossibility of competition, and not in the form of the contract. If we hold that the city may contract for such articles, I do not see that any additional hazard is incurred by allowing the price to be graduated according to time, as in other cases.

It is just as easy for bidders disposed to take undue advantage, to add to the price demanded as to the number of days required for performance.

The seventh specification related to the charge of commissions at the rate of two and a half per cent. up-

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on the whole amount payable into the bureau of assessments.

This results in a charge of two and a half per cent. upon the amount expended upon the work, and also of two and a half per cent. upon the commission chargeable upon that sum, and, at first sight, the charge would seem to be excessive. But on an examination of the statute, I am inclined to the opinion that it is justified. The act contemplates that where work is done by assessment, the whole expenses shall be borne by the property owners, and no part of it by the city. To accomplish this result, the whole of the commission payable to collectors should be included in the assessment.

The commission allowed by the statute for collection, is two and a half per cent. on all items of assessments collected by the bureau. The collectors are not allowed by the statute (see *Hoffm. L.*, 240) to retain their commissions and pay the balance into the bureau, but must pay into the bureau the whole amount collected, and on the amounts so paid in, commissions are to be computed and paid monthly by the comptroller on the requisition of the street commissioner.

Under this system, if the two and a half per cent. were computed only on the cost of the work, the city would inevitably be the loser to some extent. For instance,—a piece of work costs four thousand dollars : a commission of two and a half per cent. added to that would make the whole amount to be assessed, four thousand one hundred dollars. The collector collects and pays into the bureau four thousand one hundred dollars. He is then entitled by law to draw out two and a half per cent. on the four thousand one hundred dollars paid in, which commission would be, not one hundred dollars, but one hundred and two dollars and fifty cents. The two dollars and fifty cents would thus be lost by the city. This result can only be avoided

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by the system which was pursued in these cases, of including in the assessment the whole amount of commissions which the collectors would be authorized to draw.

The eighth and last specification is, that the principle upon which the assessment was apportioned is erroneous, it not being imposed upon the several lots in proportion to the advantage which each derived from the pavement, but in proportion to the frontage. We do not think that this is a subject which could be inquired into in this form of proceeding. If an error has been committed in not making an equitable apportionment of the sum assessed among the several property owners, it is an error of judgment on the part of the commissioners, and not a fraud or irregularity in the proceedings.

The act of 1858 can only be resorted to for the purpose of reviewing such frauds or irregularities.

The petitioners have taken the point that the assessment was not confirmed by the common council, and that the act of 1861, which purports to dispense with such confirmation, is unconstitutional, by reason of not being properly entitled.

We cannot inquire into this objection, for the reason that it is not stated in the petition, and, consequently, was not passed upon by the court below.

It is claimed on the part of the city that though there be an irregularity in the assessments, the order setting them aside should be reversed, and a deduction ordered of the sums erroneously included in the assessment, pursuant to the provisions of the act of April 26, 1870, § 27 (*Laws of 1870*, p. 903).

That act provides that if, upon the hearing of proceedings brought pursuant to the act of 1858, it shall appear that, by means of an irregularity, the expense of a local improvement has been unlawfully increased, the judge may order the assessment upon the lands of

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the aggrieved party to be modified, by deducting from the assessment thereon the proper proportion of the excessive expenditure.

The court below held that this act could not operate in the present proceedings, the hearing thereon having been had before the passage of the act, and the act not being retroactive.

We are of the same opinion.

The orders appealed from should be affirmed, with costs.

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Court of Appeals, 1871.

ASSESSMENTS FOR LOCAL IMPROVEMENT. — PUBLICATION OF NOTICE.

The provision of section 7 of the New York city charter (*Laws of 1857*, 875, ch. 446, § 7), in relation to the proceedings of the common council, which provides that, "all resolutions and reports of committees which shall recommend any specific improvement involving the appropriation of public moneys, or the taxing or assessing the citizens of the city, shall be published . . . in all the newspapers employed by the corporation, and shall not be passed or adopted until after such notice has been published at least two days," requires the two days notice to be published in *all* the corporation papers; and if the resolution be passed without such publication, an assessment founded thereon will be vacated.

Appeal from an order.

George W. Douglass applied under the act of 1858 to vacate an assessment imposed for regulating and grading Sixty-fourth-street from Third-avenue to Fifth-
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avenue, in New York city, on the ground that the resolution and report of the committee recommending the improvement, or notice thereof, had not been published as required by section 7 of the charter of 1857, which provides as follows: "All resolutions and reports of committees which shall recommend any specific improvement involving the appropriation of public moneys, or the taxing or assessing the citizens of the city, shall be published immediately after the adjournment of the board, under the authority of the board, in all the newspapers employed by the corporation, and shall not be passed or adopted until after such notice has been published at least two days."

It appeared by the proofs that the corporation papers (appointed according to *Laws of* 1863, 410, ch. 227, § 2), were, at the time of the adoption of the resolution authorizing the work, the *New York Herald and Tribune* (daily), and the *Leader and Dispatch* (weekly) papers.

The resolution authorizing the work was introduced in the board of aldermen July 2, 1863, and was referred to the committee on roads. On July 7, 1863, a notice of the resolution was published in the *Herald and Tribune*, but no such notice was ever published in the *Leader* or *Dispatch*. On August 25, 1863, the committee on roads, in the board of aldermen, reported favorably, and notice of this report was, on August 27, 1863, published in the *Herald and Tribune*, but no notice of the report ever appeared in the *Leader* or *Dispatch*. On September 15, 1863, the report and resolution authorizing the work were adopted, and directed to be sent to the board of councilmen for concurrence. On September 17, 1863, the resolution was received by the board of councilmen, and referred to the committee on roads. On September 19, 1863, notice of the receipt of the resolution, and its reference to the committee on roads, in the board of councilmen, was published in

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the *Herald* and *Tribune*, but no such notice ever appeared in the *Leader* or *Dispatch*. The committee reported favorably September 21, 1863, and notice of their report was published in the *Herald* and *Tribune*, September 22, 1863, but no notice thereof ever appeared in the *Leader* or *Dispatch*. The resolution and report were adopted by the board of councilmen, September 24, 1863.

No other publications of the resolution previous to its passage, other than those mentioned, were ever made. It appeared that it had been usual to publish, in the weekly papers employed by the corporation, the ordinances, only after their final adoption and approval by the mayor, and that the weekly papers were not employed to make any of the publications required by section 7 of the charter of 1857.

The petition to vacate the assessment was denied, the court holding that the direction of the statute to publish the proceedings in all the papers employed by the corporation was merely directory, and that the prohibitory portion of the section, which forbids the passage of any resolution until "such notice has been published for at least two days," was satisfied by the publication of the notice in some of the corporation papers for at least two days before the resolution was adopted. The court was also of opinion that publication "for two days" was not to be construed to mean two publications, but that one publication was sufficient, provided two days elapsed between the publication and the passage of the resolution * (reported in 9 *Abb. Pr.*, 84; S. C., 58 *Barb.*, 174; 40 *How. Pr.*, 241). The or-

* This point is not passed upon in the opinion of the court of appeals; and in a subsequent case (Matter of Volkening), the supreme court at special term (CARDOZO, J.), has decided differently, holding that the statute requires two publications. An appeal from that decision, I am informed, is now pending before the general term. Compare *Steinle v. Bell*, p. 171 of this volume.

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der denying the application was affirmed by the general term, and the petitioner appealed to the court of appeals.

Richard O'Gorman, counsel to the corporation of New York, for the appellant.—I. The statute is directory, and a failure in strict compliance therewith does not avoid the resolution. (1.) The statute contains no provision that an omission to make the publication directed will render the resolution void. In the absence of such a provision, the statute will usually be held to be directory (*Sedgw. on Stat. & Const. L.*, 370, 371, 378; *Regina v. Fordham*, 11 *Ad. & E.*, 88; *Cole v. Green*, 6 *Man. & G.*, 872, 890; *Rex v. Inhabitants of Birmingham*, 8 *Barn. & C.*, 29, 35; *Rex v. Inhabitants of St. Gregory*, 2 *Ad. & E.*, 99; *Savage v. Walshe*, 26 *Ala.*, 619; *Rex v. Justices of Leicester*, 7 *Barn. & C.*, 6). When statutes direct proceedings to be done at a certain time, or in a certain way, and no essential rights are prejudiced by disregard of such provisions, the proceedings will be held good, although the statute may have been disobeyed or disregarded (*Sedgw. on Stat. & Const. L.*, 368, *et seq.*). In *Striker v. Kelley* (7 *Hill*, 9), it was held that the statute directing the vote of the New York common council to be taken and recorded by ayes and nays was merely directory. The same adjudication has been made with respect to a similar provision of the State constitution (*People v. Supervisors of Chenango*, 8 *N. Y.* [4 *Seld.*], 317). A tax was voted at a town meeting, of which notice had not been given by posting hand-bills, as required by statute. The act was held directory, merely, and the tax well laid, in *Marchant v. Langworthy* (6 *Hill*, 646; affirmed in 3 *Den.*, 526; see, also, *Pond v. Negus*, 3 *Mass.*, 230; *Williams v. School Dist.*, 21 *Pick.*, 75; *Gale v. Mead*, 2 *Den.*, 160; *Thomas v. Crapp*, 20 *Barb.*, 165; *City of Lowell v. Hadley*, 8 *Mele.*, 180;

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People v. Holley, 12 *Wend.*, 481; Matter of Mohawk & Hudson River R. R. Co., 19 *Id.*, 143; People v. Cook, 14 *Barb.*, 559; affirming 8 *N. Y.* [4 *Seld.*], 67, 88, 89, 93; People v. Supervisors of Ulster County, 34 *N. Y.*, 268; Barnes v. Badger, 41 *Barb.*, 98). (2.) If the legislature had intended to make it imperative that the notice should be published in *all* the newspapers employed by the corporation, that intent would have been made clear by adding at the end of the prohibitory sentence, the words, "in all of said papers." The statute is, therefore, mandatory only so far as it prohibits the passage of the ordinances specified, without publication of notice for two days. But the provision of the statute in respect to the number of papers in which such publication shall be made, not embraced in the prohibitory clause, is merely directory.

II. (1.) The assessment is attempted to be vacated on the ground of a mere technicality. No fraud or bad faith is alleged on the part of the corporation. The sum assessed has been expended for the benefit of the petitioner's property, which has been benefited to the extent of the assessment. In such a case, the court will construe the statute liberally, and if its requirements are substantially fulfilled, and the legislative intent essentially observed, the proceedings of the corporation will be upheld. Statutes which confer and regulate powers of municipal corporations to make improvements for the public benefit are of a remedial nature, and are to be construed liberally, with a view to the beneficial end proposed (*Hudler v. Golden*, 36 *N. Y.*, 446). (2.) Public policy and a proper regard for the public weal, forbid the court to declare the resolution invalid and the assessment void. Since the year 1857, the provision requiring publication of such notices in *all* the newspapers employed by the corporation, has been in existence, and during that entire period weekly newspapers have been employed

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by the corporation, as well as daily newspapers, and during all that period the publication has been made as described in the the proof herein, viz: in the daily papers have been published the full minutes of the proceedings at the stated sessions of the common council; in the weekly papers only the completed proceedings, consisting of the resolutions, &c., finally adopted and approved by the mayor. To grant the judgment asked by these petitioners, is to overturn every assessment laid within the period named, and to adjudge that when weekly newspapers are employed by the corporation, the entire corporate business must be delayed until such papers can publish in their weekly issue the resolutions proposed and the reports made to the respective boards of the common council. Such needless inconvenience and expensive obstructions of the public business, could not have been within the contemplation of the legislature when the law was enacted, and if it be within the letter of the law, the court should allow the petitioner to suffer a wrong which has inflicted no injury upon him, rather than subject the corporation to remediless disaster (2 *Kent Com.*, marg. p. 339). (3.) The mischief consequent upon such an interpretation of the statute, would be enormous. A statute should not be so construed as to work a public mischief (*People v. Laimbeer*, 5 *Den.*, 9). Chief Justice TILGHMAN put his decision in favor of the validity of a deed upon the ground that, "so extensive and deep rooted is the practice, that numerous titles depend on it, and it would be unpardonable to disturb it now by a critical examination of the words of the act (1 *Serg. & R.*, 106; and see *McKeen v. Delaney*, 5 *Cranch*, 32; *Bank of Utica v. Mersereau*, 3 *Barb. Ch.*, 577).

Charles E. Miller, for the respondent.—I. The resolutions and reports of committees are clearly within

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the provisions of the statute requiring publication, since both the resolution and the reports recommend a specific improvement, viz: "regulating and paving Sixty-fourth-street."

II. An omission to publish the resolution, and each report of each committee in each and every paper employed by the corporation, is a fatal irregularity, which invalidates the assessment. (*a.*) In construing section 7 of the charter of 1857, the following rules of construction are to be borne in mind: 1. That the intent of the legislature is the first object to be attained in the construction of a statute (*Sedgw. on Stat. & Cons. L.*, 229, 231, and cases cited). 2. This intent is first to be sought in the language of the statute itself (*Newell v. People*, 7 *N. Y.* [3 *Seld.*], 97; *McClusky v. Cromwell*, 11 *N. Y.* [1 *Kern.*], 601, 602). 3. In construing the language of the Act, the object of the legislature in passing the act should be considered. 4. The court should so read the statute as to endeavor to give effect to the whole of it (*Blackw. on Tax Titles*, 610, §§ 36, 37, and cases cited). 5. The entire section should be read and construed together.

III. (*a.*) By the words "such notice," in section 7, is meant the publication previously referred to in all the newspapers, and the word "such" describes the manner of the publication. It is precisely the same as if the legislature had used the words "such publication." (*b.*) The object of the provision requiring publication, was to give notice to parties liable to assessment for any improvements, of the pendency in the common council of proceedings which might result in such assessment. Any property owner purchasing or subscribing for any one of the corporation papers, had a right to assume that such paper would contain the publication required by statute, and conclude, in the absence of such publication, that no proceeding affecting or liable to affect his property by assessment,

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was pending before the common council. This construction is sustained by reference to previous statutes in relation to the same subject. The charter of 1830 contained a similar provision requiring publication to that required by the charter of 1857, except that the former did not specify how long or frequent the publication should be made, nor prohibit the passage or exclusion of the resolutions and reports until after publication. The courts held, that this provision in the charter of 1830, as to publication, was directory (*Striker v. Kelly*, 7 *Hill*, 9, and cases cited). It was to remedy the very difficulty that arose from this construction of the provision of the charter of 1830, that the legislature in 1857 enacted that the resolutions and reports should not be passed or adopted until the publication in all the newspapers had been made, for at least two days.

IV. The court below erred in holding that the statute was directory so far as it required publication in all the corporation papers, and that its provisions were satisfied by the publication in some "or one" of them. Such a construction can only be sustained by the introduction of words not employed by the legislature, or by qualifying and limiting the meaning of the words used. This is not permissible where, as in this case, the language of the statute is clear and explicit, and its provisions unambiguous (*King v. Inhabitants of Ramsgate*, 8 *B. & C.*, 712, 715; *Lamord v. Eiffe*, 3 *Q. B.*, 910; *King v. Burnell*, 12 *A. & E.*, 468; *Bidwell v. Whittaker*, 1 *Mich.*; *Sedgw. on Stat. & Cons. L.*, 244, 247).

BY THE COURT.—ANDREWS, J.—Section 7 of the act to amend the charter of the city of New York, passed in 1857 (*Laws of 1857*, ch. 446), after providing for the organization of the two boards of the common council, proceeds as follows:

"All resolutions and reports of committees which

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shall recommend any specific improvement involving the appropriation of public moneys, or the taxing or assessing the citizens of the city, shall be published immediately after the adjournment of the board, under the authority of the board, in all the newspapers employed by the corporation, and shall not be passed or adopted until after such notice has been published at least two days."

The manifest design of this provision was to apprise the tax-payers of the city, in the manner pointed out by the statute, of any contemplated improvement involving expenditure and taxation, before it should be directed by the common council, that by a remonstrance or suggestion the proposed action might be prevented or modified.

The prohibition against passing an ordinance involving expenditure, until the required publication should be made, was a limitation upon the power of the common council. There is no room for the suggestion that this clause of the section was directory. It was plainly mandatory, and a compliance with it was essential to the legal exercise by the corporate authorities of the power to authorize and direct local improvements, or to subject the property of citizens to assessment therefor. Municipal, like private corporations, must act within the limitation prescribed by the sovereign power, and they cannot impose a charge upon the person or property of individuals, unless they proceed in the manner prescribed by law (*Stepson v. Kempton*, 13 *Mass.*, 272 ; *Smith on Stat.*, 789 ; *Sharp v. Spear*, 4 *Hill*, 76). The publication referred to in the last clause of the section is the publication first spoken of,—viz : a publication in all the newspapers employed by the corporation. This is the natural construction, and it meets the design of the law, which was, not only to provide that notice should be given by publication, but to define, by a uniform rule, the na-

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ture and extent of the publication to be made. If, therefore, the resolution recommending the improvement for regulating and grading Sixty-fourth-street was not published, before it was passed by the respective boards of the common council, in all the newspapers employed at that time by the corporation, the ordinance directing it was void, and the assessment of the plaintiff on account of it was unauthorized.

By chapter 227 of the *Laws of* 1863, the corporate authorities of the city are prohibited from paying from money raised by tax or assessment, any sum for advertising, except for advertisements in newspapers authorized by the mayor and comptroller, and it is made their duty to designate not less than four papers in which advertisements may be inserted. When the proceedings for regulating Sixty-fourth-street were taken, there were four papers which had been designated under the statute for the purpose therein stated. The designation was general in terms, but under it the practice had been to publish the separate proceedings of each board of the council in two only of such papers, and the final complete proceedings of the joint boards in the others.

The resolution for regulating and grading Sixty-fourth-street was published before its passage in but two of the designated papers. This was, we think, a plain violation of the statute. The papers designated by the mayor and comptroller became, by such designation, and by actual employment of them by the council for advertising purposes, official papers of the corporation. The statute required publication of the resolution referred to in all papers employed by the corporation. The extent to which these papers, or any of them, should be employed by the council is, in the absence of any statutory rule, in the discretion of the corporation; but in respect to notice of proceedings mentioned in section 7 of the charter of 1857, the stat-

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ute prescribed what publication should be made. It was not intended to leave the matter to the determination of the common council in each particular case. The council can determine how many of the papers designated by the mayor and comptroller shall be employed to do the public advertising, but the statute requires that in all of these thus employed, resolutions proposing specific improvements involving taxation should be published before final action upon them.

The conclusion is that the grading of Sixty-fourth-street was passed in violation of law, and that the assessment based upon it was void.

The order of the general term should be reversed.

STEINLE *against* BELL.

New York Common Pleas; Special Term, February,
1872.

SERVICE BY PUBLICATION. — PROOF OF NON-RES-
IDENCE.—AFFIDAVIT OF DEPOSIT IN POST-OFF-
FICE.—DEFINITION OF WORD "WEEK."

To obtain an order allowing service of summons by publication, in a foreclosure suit, an affidavit of the non-residence of the defendant, made on information and belief, is sufficient.*

An affidavit of a person that he deposited a copy of the summons and

* Compare Brooklyn Daily Union v. Hayward (11 Abb. Pr. N. S., 235). See, also, Bascom v. Smith (31 N. Y., 595), where an affidavit stating that deponent "applies for an attachment against defendant, on the ground that he is a non-resident of," &c., without any other direct allegation, was sufficient to sustain jurisdiction, as against third parties.

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complaint "duly directed" to the defendant "at Belleville, New Jersey, and paid full postage thereon, there being a regular mail communication between the city of New York and Belleville, New Jersey," — *Held*, sufficient to show a deposit of the summons and complaint, duly directed, &c., in the post-office at *New York*.

A week is a definite period of time, commencing on Sunday and ending on Saturday; and under the rule requiring service by publication to be made, by publication "not less than once a week for six weeks," the notice need not be published on the same day in each week, but may be on any day in each week during the six weeks. Seven days' interval between publications is not essential.

Trial by the court.

Townsend & Levinger, for the plaintiff.

Wakeman & Latting, for the defendant.

LARREMORE, J.—The material facts in this case are undisputed, and the decision of it depends upon the questions of law raised on the trial.

It will hardly be claimed, in view of the evidence, that the judgments returned against Dunn, are liens on the property in question, and the only remaining objection to the title, is the outstanding mortgage of four hundred dollars, given to Stewart (and so far as the proofs and records show), held by him at the time of the proceedings in foreclosure hereinafter mentioned.

It is contended that said mortgage is cut off by the foreclosure of a prior mortgage, to which suit Stewart was a party. It appears from examination of the judgment roll in said suit, that Stewart was served as a non-resident defendant, by publication of the summons, in pursuance of section 135 of the Code.

Two objections are urged as to the validity of such service :

1. That the affidavit upon which the order of publication was made, was defective, and conferred no jurisdiction upon the judge who made said order.

2. That the summons was not published, nor was a deposit made in the post-office, in the manner prescribed by law.

The affidavit upon which said order was granted, was made by the managing clerk of the attorneys who conducted the foreclosure suit. He swears "that he has made great efforts to get personal service upon said Stewart and his wife, and has made diligent search for them in the city of New York, where they formerly resided, but has not been able to find them, nor can he find them; but he is informed and believes, that they are non-residents and do not reside in the State of New York, but do reside at Belleville, in the State of New Jersey." In addition to this, is the affidavit of one of the attorneys for the plaintiff, who swears, on information and belief, that Stewart and wife do not reside in the State of New York, but reside in Belleville, in the State of New Jersey.

In neither affidavit is it stated from whom the information was derived. The order of publication recites that the defendants Stewart and wife cannot, after due diligence, be found within this State, and that they are not residents thereof.

Do these affidavits, or either of them, meet the requirements of the statute?

The action is one affecting real estate in which the defendant has an interest, and of the subject matter of which the court had jurisdiction.

It was held by the general term of the supreme court, in *Van Wyck v. Hardy* (11 *Abb. Pr.*, 475), that an affidavit as to non-residence made upon information and belief, was sufficient. This decision, though made by a divided court, has not (so far as I can learn), ever been overruled. It was reviewed at the Monroe general term in *Peck v. Cook* (41 *Barb.*, 547), where it was intimated that the ruling should not be extended beyond the facts of that case.

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The cases cited by defendant's counsel do not necessarily conflict with the decision in *Van Wyck v. Hardy* ; and as the fact of Stewart's non-residence was not controverted on the trial, I think, after a lapse of fifteen years, it may be safely assumed. I feel it my duty to follow the ruling of the general term in this district, and hold the affidavit in question sufficient.

The affidavit of Weller, as to the mailing of the summons and complaint, showed that he deposited a copy thereof "duly directed to James Stewart, and Ann Stewart, his wife, at Belleville, New Jersey, and paid full postage thereon, there being a regular *mail* communication between the city of New York and Belleville, N. J." The use of the terms "*full postage*," and "*regular mail*," together with the designation of the places between which communication by mail was designed to be made, leave no reasonable doubt as to the fact that the deposit was made in the post-office at New York city. And Weller testified on the trial that the deposit was thus made.

Mrs. Stewart had no interest in the property at the time of the foreclosure. She had previously joined with her husband in a conveyance of it to Krahmer. The copy of the summons and complaint, as mailed and directed to "James Stewart, and Ann Stewart, his wife," was, I think, a substantial compliance with the statute as to James Stewart.

A more serious question arises as to the publication of the summons. By section 135 of the Code, such publication is to be made *not less than once a week for six weeks*. The affidavit of the printer of the *Daily News*, annexed to the judgment roll in foreclosure, shows that the summons was published in that paper once in each week for six weeks commencing November 15, 1856. Such affidavit is presumptive, but not conclusive, evidence of the regularity of the proceeding. It was shown on the trial, by the produc-

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tion of the files of the newspaper in question, that said summons was published on the following days :

1856.	Nov.	15.	Saturday.
"	"	17.	Monday.
"	"	24.	"
"	Dec.	1.	"
"	"	8.	"
"	"	15.	"

It is thus apparent that but two days intervened between the first and second publication of the notice, whereas it is urged that such interval should have been seven days. If the latter proposition be correct, the defect, being one of jurisdiction, is fatal, and the defendant is entitled to the relief sought.

What, then, is the legal interpretation of the term *week*, as used in section 135, which directs publication of the summons "once a week for six weeks."

In *Bouvier's Law Dictionary*, a week is defined to be "seven days of time, commencing immediately after twelve o'clock on the night between Saturday and Sunday, and ending at twelve o'clock, seven days of twenty-four hours each, thereafter ; of which the first day thereof is called Sunday, and the seventh, Saturday (2 *Bouv. L. Dic.*, 647).

In *Roukendorff v. Taylor* (4 *Pet.*, 361), an objection was made to the validity of a tax sale, on the ground of the insufficiency of the notice thereof. The act of Congress, under which the sale was made, required the collector to give public notice of the time and place of sale, by advertising once a week for three months. The first notice was published on December 6, 1822, the last on March 10, 1823. The full time was embraced in these periods, but it was contended that the notice was not published once in each week, within the meaning of the act, inasmuch as by an examination of the dates of publication, it appeared that at one time eight days, at another, ten days, and at another, eleven

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days transpired between said dates. This, it was urged, was fatal to the proceeding ; that the publication, being once made, it was essential to the validity of the notice that it should be published every seventh day thereafter.

Mr. Justice McLEAN, in delivering the opinion of the court, says: "The words of the law are *once a week*. Does this limit the publication to a particular day of the week? If the notice be published on Monday, is it fatal to omit the publication until the Tuesday week succeeding? The object of the notice is as well answered by such a publication, as if it had been made on the following Monday. A week is a definite period of time, commencing on Sunday and ending on Saturday. By this construction, the notice in this case must be held sufficient. It was published Monday, January 6, and omitted until Saturday, January 18, leaving an interval of eleven days ; still the publication on Saturday was within the week succeeding the notice of the sixth. It would be a most rigid construction of the act of Congress, justified neither by its spirit nor its language, to say that this notice must be published on any particular day of the week. If published once a week, for three months, the law is complied with, and its object effectuated" (See, also, *Bunce v. Reed*, 16 *Barb.*, 347.

Adopting this construction upon the point in controversy, the publication of the summons appears to have been in accordance with the statute. The authorities referred to (*Brod v. Heyman*, 3 *Abb. Pr.*, 396 ; *Richardson v. Bates*, 23 *How. Pr.*, 516) relate to cases in which judgment was entered before the expiration of the time in which service by publication was complete. In this case no such objection can be made, as such service was complete on January 16, 1857, and the judgment was not rendered until March 2, 1857.

It was held in *Sheldon v. Wright* (7 *Barb.*, 39) that

the publication of a surrogate's order to show cause, which, by statute, was required to be published immediately for four weeks successively, was properly made by four successive weekly publications before the return day thereof, and that the statute did not require the first of the four successive publications to be four weeks before the day of showing cause. The ruling in this case was cited and approved in *Olcott v. Robinson* (21 *N. Y.*, 150), which establishes the doctrine that upon a sale of real estate upon execution, publication of the notice in six successive numbers of a weekly paper was a sufficient compliance with the statute, although the first publication may be less than six weeks prior to the sale; provided said notice was posted, as required by the statute, forty-two days previous to the sale.

In view of the decisions referred to, and the facts and circumstances of the case, I think the defendants should complete the contract for the purchase of the premises. As they have acted in good faith, and the objections raised were such as should be passed upon by the court, no costs are allowed. Let a judgment be entered that defendants complete the purchase within twenty days after service of the order, and for a dismissal of the complaint without costs. If the defendants neglect or omit to complete the purchase as above prescribed, then the plaintiff shall have judgment in his favor, with costs. The judgment herein to be settled on two days' notice.

Weed v. Peterson.

WEED *against* PETERSON.

*Supreme Court, Third District; Albany Circuit,
February, 1872.*

TRADEMARK.—DAMAGES FOR USING.

Damages ought not to be recovered against a defendant, who in ignorance of the plaintiff's rights and claims, has used a trademark belonging to the plaintiff.

Trial of an action by William H. Weed and others against Gilbert Peterson and others, to restrain the use of a trademark and to recover damages.

One Daniel Simmons, who, from 1842, had been engaged in the business of making axes, took the plaintiffs into partnership with him in 1848, under the name of "D. Simmons & Co.," which they used on their stamps and labels. The firm continued till Simmons' death in 1860, without any change in the trademark. In Oct., 1861, plaintiffs made an arrangement with Jonas, the legatee of Daniel Simmons, and with the executors of the latter, under which they ever since continued the use of the name "D. Simmons & Co." as their trademark. Other facts appear in the opinion.

John Sherwood, for the plaintiff.

Ely & Sickles, for the defendant.

LEARNED, J.—I think there is no doubt that the plaintiffs are entitled to use the trademark "D. Simmons & Co.," and that Jonas Simmons did not have (at least after October, 1861) any right to use that name. So, also, the use of the name "D. Simmons," as a trademark on axes and tools, is but a fraudulent imitation of the name "D. Simmons & Co.," and Jonas Simmons, certainly after October, 1861, had no right whatever to use that imitation.

So far then as the plaintiffs seek to restrain the de-

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fendants from using this trademark, they are entitled to the relief. But as to the matter of recovering damages, other matters are to be considered.

The defendants had stopped business at or before the time of the commencement of this action, with no intention of resuming, and they have not resumed. Two of the defendants (the only defendants now in the State, and evidently the responsible parties), went into the business in the spring of 1869. They were not axe manufacturers; but had become creditors of an old firm to a large amount; and they took hold of the business to save themselves. They gave no personal attention to the business; and they had no information that the plaintiffs claimed a right to this trademark. The old firm which they succeeded had used the trademark "D. Simmons;" and these two defendants, at the time of succeeding to the old firm, understood from them that they had a right to use the same. The defendants received the stamps and labels from the old firm. After carrying on business for a time, the defendants were sued by Jonas Simmons, for using the trademark "D. Simmons," to which he claimed to be entitled. They compromised with him, and in pursuance of such compromise, took him into their employment, in which he continued till they stopped business. There is every reason to believe that these two defendants acted in perfect good faith in using this trademark. As to the third defendant, not now in this State, there is no positive evidence, except that he had been in the old firm, and that in that old firm, under the authority (which he claimed) of Jonas Simmons, that trademark had been used.

If the defendants had taken up, on their own suggestion, this name of "D. Simmons," it might be said with force, that they must have known that it was not the name of either of them, and that, therefore, they were not justified in using it. But when it appears that Jonas Simmons had claimed it, that their prede-

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cessors had used it, and, finally, that Jonas Simmons had sued them for an infringement of his rights in using this name, then it is manifest that all which they did was in good faith, without any wrong intent and in ignorance of the rights of the plaintiffs.

Now, without going over in detail the cases on this subject, it will be found that they all speak of "imitation of trademarks," "adoption of trademarks," "colorable resemblances," and the like; implying in all instances that the acts of the party charged with doing a wrong are *intentional*. To illustrate: if a manufacturer had adopted and for a long time used a trademark, so that he had acquired an undoubted right to protection, and another manufacturer, in ignorance of this fact, should accidentally adopt precisely the same mark, there would be no intentional injury. The rightful owner of the trademark, by giving to the other person notice of his right, could place the latter in the wrong in respect to anything *thereafter* done in violation of the owner's rights. But as to all previous acts, it could not be said that there was any "imitation," or "adoption," or "colorable resemblance." There would have been, previous to such notice, none of that intent to palm off the manufactures of one man for those of another, which appears in all the cases on this subject.

The case is still stronger where the defendants not only are ignorant of the plaintiff's claim, but have been induced, by a previous litigation, to acknowledge a similar claim made to the same trademark by a third party.

I think, therefore, that the plaintiffs should have a permanent injunction, as prayed for, and that they should recover costs; but I do not think that they are entitled to any damages, and in that respect the prayer of the complaint is denied.

Judgment accordingly.

People *ex rel.* Grace v. Police Commissioners of Troy.

PEOPLE *ex rel.* GRACE *against* POLICE COMMISSIONERS OF TROY.

Supreme Court, Third District; Special Term, November, 1871.

MANDAMUS.—JUDICIAL ACT.

Mandamus does not lie to compel a board of police commissioners to reinstate an officer whom they have discharged for disqualification, after an examination of the charge, on due notice to him, and on his appearance.*

Such a trial and discharge is a judicial act.

John J. Grace, the relator, applied for a mandamus addressed to the board of police commissioners of the city of Troy, under circumstances stated in the opinion.

M. I. Townsend, for the relator

R. A. Parmenter, opposed.

LEARNED, J.—This is a motion for a mandamus to compel the defendants to sign drafts for the salary of the relator, and to permit him to discharge his duties as captain of police.

Grace, the relator, was appointed captain of the police in December, 1870. On June 19, 1871, he was served with a notice to appear before the commissioners on the 21st of that month, to answer charges preferred against him, for disqualification, by reason of being over age. The relator appeared, and such proceedings

* Compare People *ex rel.* Bartlett v. Med. Society of Erie, 32 N. Y., 187; People *ex rel.* Johnson v. Supervisors of Erie, 45 Id., 196; modifying 9 Abb. Pr. N. S., 408, 416; Howland v. Eldridge, 43 N. Y., 457; People *ex rel.* Walker v. Albany Hospital, 11 Abb. Pr. N. S., 4.

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were had that on July 1, 1871, the board removed him, on the ground of his being over forty years of age.

In giving this brief statement of the transaction, I have not attempted to show the merits of the case, nor to set forth the evidence on which the commissioners acted; nor to state the alleged refusal to give the relator time to produce evidence. For on the ground which I propose to examine first, it is not material to go into the merits, or to inquire whether the commissioners acted reasonably or decided correctly.

The first question must be, Does a mandamus lie in such a case? or, is the relator's remedy to be sought in some other way,—for instance, by a *certiorari*?

In the case of *Oneida Common Pleas v. People* (18 *Wend.*, 79), decided in the court of errors, Mr. Senator TRACY very fully and ably discussed the nature of the writ of mandamus. He showed what its objects and powers had originally been, and how they had gradually been extended. And he pointed out that, in some instances, it had been issued where it was not the proper remedy. He remarked of the supreme court (and I think the remark is worth repeating), "that there is reason to believe that the anxious pursuit of individual right, which has always distinguished that tribunal, is disposing it to apply the remedial aids of this writ to an extent which, however much it may promote the justice of particular cases, tends, in some degree, to disturb that distribution of judicial powers which our legal institutions contemplate and require."

In the case of *People v. Dutchess Common Pleas* (20 *Wend.*, 658), the supreme court, acknowledging that there had been a departure from the old law on the subject, adopt the decision of the court of errors, and reinforce it by further citations. From both these cases the doctrine may be drawn that *mandamus* lies to compel the performance of *ministerial* acts; that it also lies to subordinate tribunals, requiring them to

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exercise their functions and render *some* judgment ; but that where the act to be done is judicial and discretionary, this court will not direct *what decision* shall be made.

Since the somewhat loose practice, which has grown up in all particulars under the Code, it is possible that the true principle, so accurately laid down in these two cases, has been again departed from. And the remark above quoted from Senator TRACY, may be again applicable. But I find no authority controverting this principle. The case of People *ex rel.* Livingston v. Taylor (30 *How. Pr.*, 78), which, perhaps, goes as far as any, is put on the ground that the commissioner of jurors is a ministerial officer. In the case of People *ex rel.* Titus v. Board of Police * (35 *Barb.*, 535), as well as in the case immediately preceding it, and also in the case of People v. Board of Police (19 *N. Y.*, 188), there had been no trial of the relator, and no judicial action of the board removing the relator from office. And in the case of People v. Contracting Board (27 *N. Y.*, 378), and another case of similar title (33 *N. Y.*, 382), the doctrine is affirmed that mandamus will not lie where the act requires the exercise of discretion.

*With these principles to guide, I turn now to the act of the police commissioners of which the relator complains. It appears by the papers, that the relator was personally notified to appear before the board to answer charges preferred against him ; that at the time appointed, he did appear before the board, then organized for the trial of charges ; that they received as evidence before them, two papers signed by Grace, his application and his return ; and that on July 1, they removed him as disqualified, on account of age.

* This case was reversed by the court of appeals, on grounds which appear in People *ex rel.* Hanrahan v. Board of Police, 26 *N. Y.*, 316.

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Now it appears to me, that this proceeding was, in every respect, *judicial*. It was on personal notice to the party; the party appeared; evidence was received; a matter of fact was determined, viz: that the relator was over forty years of age, and a decision was rendered thereupon. I have nothing to say as to the correctness of that decision. Whether the board erred in the finding of fact or in the conclusion of law; whether their action was impartial, as they claim; or whether it was influenced by improper motives, as the relator insists, I have not to decide here. I am only inquiring whether this action was of a *judicial* or simply of a *ministerial* character. I do not see how it can be called a ministerial act. It appears to me plainly judicial. The board is made a tribunal to hear and examine charges (§ 11 of the act, *Laws of 1870*, ch. 520). And when they act in this capacity, a *mandamus* will not lie to correct their action.

It may be that the relator has another remedy (People *ex rel.* Dillon v. Metropolitan Police, 15 *Abb. Pr.*, 167), but I have no occasion to decide that here. I only refer to the case to show that in an instance somewhat similar, the general term held that the party aggrieved had another means of redress.

The motion for a *mandamus* is denied, with ten dollars costs, to be paid by relator.

Norris v. Breed.

NORRIS *against* BREED.*Buffalo Superior Court; Special Term, April, 1872.*

SECURITY FOR COSTS.—ADMINISTRATOR OF NON-RESIDENT INTESTATE.

An administrator appointed in this State, and resident within the jurisdiction of the court in which he sues, will not ordinarily be required to give security for costs, under section 317 of the Code of Procedure, in the absence of mismanagement or bad faith.*

Motion that the plaintiff file security for costs.

The action was brought by John Norris, as administrator of the goods, &c., of Nehemiah F. Pearson, deceased, against Frederick W. Breed. The facts sufficiently appear in the opinion.

George Humphreys, for the motion.

George W. Cothran, opposed.

SHELDON, J.—The action was commenced by service of summons and complaint; and the motion papers show that the plaintiff is the administrator of one Pearson, who was not, at the time of his decease, a resident of this State. Letters of administration were granted by the surrogate of Erie county, and upon the plaintiff receiving the contract stated in the complaint, he instituted this action. The defendant, as well as the administrator, reside in Buffalo.

It is claimed by the defendant, that the matters re-

* As to the case of a non-resident administrator, see *Murphy v. Darlington*, 1 *Code R.*, 85.

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lied upon make a case in which the court, in the exercise of the discretion committed to it by section 317 of the Code, should require the plaintiff to give security for costs.

No pretense has been made that there has been any mismanagement or bad faith in the action by the administrator. He has just commenced the action, which is not yet at issue, and produced in court the assignment of the contract from the former holders of it to him as administrator, and before the commencement of the action, sufficiently meeting the allegations in the moving papers, that another party, who was a non-resident, was, in fact, the owner of it. Had these allegations not been met, it might have been a case calling for the exercise of the discretion now invoked.

Upon the case as now presented, I think the motion must be denied. This court is bound to give full faith to the appointment of the administrator; and, being duly appointed, he is administrator of the whole estate. For all that appears, he has in his hands all the property that is the subject of administration. That the deceased, or his widow, or next of kin, are non-residents, cannot affect the merits of the motion. The plaintiff is the only known representative of the estate, and is entitled to reduce to possession the whole personality, and can be held to a strict account if he does not do so. In his capacity as administrator, he has received the instrument and demand upon which the action is brought, and if he should be compelled now to file security for costs before he can proceed, it might amount to a denial of justice.

I think the discretion allowed to be exercised by the statute, has been rarely sought for. In *Darby v. Condit* (1 *Duer*, 599; S. C., 11 *N. Y. Leg. Obs.*, 154), Ch. J. OAKLEY, in discussing this provision, says:—"We are not prepared to say in what cases the broad discretion which has been given to us by the section

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under consideration, will be exercised ; but we are satisfied that cases in which it can *be properly exercised*, will rarely occur."

Indeed, it has been held by one of the most excellent special term judges of the supreme court, the late Mr. Justice WELLES, that the cases in which the discretion in question should be exercised, are those mentioned in the previous part of the section, in which the court is authorized to direct the costs to be paid by the plaintiff or defendant personally, for mismanagement or bad faith in the action or defense (*Kimberly v. Stewart*, 22 *How. Pr.*, 281). I see no reason to dissent from his opinion. Should it, at any time during the progress of the case, be made to appear that the administrator was acting in bad faith or guilty of mismanagement, it would be the duty of the court, on motion pending the action, to require him to give the security contemplated by the last clause of the section.

The motion is denied, but without prejudice to the right of making a new motion, when the defendant may be advised so to do, and, under the circumstances of the case as made in the motion papers, I think the defendant ought not to be charged with costs of opposing the motion.

NASH *against* DOUGLASS.

City Court of Brooklyn ; Special Term, February, 1872.

ABDUCTION OF CHILDREN. — ACTION TO RECOVER
CHILD FROM CHILDREN'S AID SOCIETY.

Where the agent of a Children's Aid Society, being deceived by the false representations of a boy, eighteen years of age, who gave a

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false name and pretended that he was an orphan, &c.,—sent the boy to a home in the West,—*Held*, that an action by the boy's parent to compel his return, and for damages, could not be sustained. The fact that the defendant had neglected to make inquiries as to the truth of the boy's story, was not material in such an action, as the inquiries would have been fruitless.

The enticement to travel and find new homes, which is held out by a Children's Aid Society, being necessary to the conduct of the society and sanctioned by the statute incorporating it, is not an unlawful enticement or solicitation.

Trial by the court.

Thomas Nash brought this action against R. D. Douglass, to compel the defendant, who was an officer of the Children's Aid Society of the city of Brooklyn, to return plaintiff's son, who was a minor, and also to recover one thousand dollars damages for the alleged enticing away and harboring of said minor. The material facts appear fully in the opinion.

E. Louis Lowe and *William L. Gill*, for the plaintiff.

Charles W. West and *Elliot Sandford*, for the defendant.

NEILSON, J.—The complaint sets forth that in April last the plaintiff's son, William, aged eighteen years, resided with his parents ; and charges that the defendant, wrongfully contriving to injure the plaintiff and deprive him of his son's society and aid, enticed the son from his father's residence, and sent him to a distant State.

The relief claimed is that the defendant be adjudged to return the son, and to pay one thousand dollars incidental damages.

It appeared on the trial that the defendant is, and for several years has been, the agent of the Brooklyn Children's Aid Society, a corporation formed in 1866 ;

and, acting in connection with a similar organization in the city of New York, is largely engaged in finding Western homes for destitute children ; that applicants for such assistance are examined by the agents of the society, and, if found to have parents or relatives, are required to procure their consent to the removal ; that a record is kept of their names, and of their locations in the West ; and that local committees in the principal Western towns are formed, to assist the officers of the society in procuring suitable homes for the children.

It further appeared that the plaintiff's son, assuming the name of William Smith, applied to the defendant to be sent West, stating that he was an orphan, born in Flushing ; that upon the death of his parents he had obtained employment in Brooklyn with a pedlar ; that he slept in the barn where the pedlar, who had quit business and left, had kept his horses. Though cared for and well clad at home, he cunningly assumed the appearance of one in want, repeated his story to the defendant at several interviews, and won his sympathy and confidence. On April 4, last, having left his home, he was taken West by the traveling agent with a party of boys ; and, on his arrival at Milton, Randolph County, Mo., accepted employment with Mr. White, a farmer living in that vicinity. The parents, on learning that William had been sent West, applied to the defendant to have the boy returned ; and the defendant sent an instruction for that purpose, with money to defray the expenses of the journey, but William had left for parts unknown.

The effort thus made by the defendant was prompt, earnest and reasonable. But that effort would be no answer to the plaintiff's claim, if the original receiving and harboring the boy had been wrongful, as charged. The paramount right of parents to the aid and society

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of their children is respected in all civilized countries, and is jealously guarded by our laws.

Within well accepted principles, it is necessary, in an action of this character, that the enticing away and harboring of the child should be willful, and with notice or knowledge of the fact that the child has parents or guardians, whose rights are thus invaded. Without such notice or knowledge, an essential element of the wrongful enticement, known to the law, is wanting. The principle involved, either as to the question of pleading, evidence, or judicial determination, is elementary. The words "entice," "solicit," "persuade," or "procure," as used in the pleadings in an action, and acted upon by the courts, have been well defined; they import an initial, active and wrongful effort.

There is, indeed, a sense in which the operations of this society, with its means of liberal aid, the opportunities it offers to travel, to visit new scenes and find new homes,—very seductive to the youthful imagination,—may amount to a solicitation; but the enticement or solicitation thus implied, springs from the very nature of and is incident to the enterprise, has its sanction in the act incorporating this society, is legitimate, and may fairly be contrasted with the wrongful enticement or solicitation of which, either for correction or punishment, the courts take cognizance.

Although in a case like this, the acceptance of a candidate without knowledge of the truth of his story works a great hardship, I am not prepared to hold that no candidate should be thus accepted. The adoption of such a rule might exclude many persons worthy of the charity of this society.

The learned counsel for the plaintiff insists that inquiries should have been made at Flushing, where William said he was born. If the question before me was as to the degree of care and diligence proper to the occasion, I could better appreciate the force of the argument. It may be that careful inquiries at Flush-

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ing would have cast doubt upon the boy's story and led to his rejection. But if such inquiries had led to no discoveries, yet the boy's story might have seemed not the less true in every particular. If the first hundred men met with in that town had never seen William Smith, if the postmaster, sheriff, commissioners of the poor, had never heard of him, that would not have been inconsistent with his truthfulness. The poor and unprotected, not noticeable for improper or criminal conduct, are generally little known, and if known, are soon forgotten.

But the question before me is not as to mere negligence, or as to the best and safest mode of carrying on the operations of this society, but as to a wrongful act—the undue solicitation of this boy to leave his parents ; wrongful conduct which cannot, under the circumstances, be imputed to the defendant.

As the action is for equitable relief, and the costs in the discretion of the court, judgment is ordered, dismissing the complaint without costs.

DABNEY *against* GREELEY.

Court of Appeals ; January, 1872.

APPEALABLE ORDER.

An order denying a motion for judgment, on the ground that a demurrer is frivolous, is not appealable.

Appeal from an order.

Charles H. Dabney and others sued Horace Greeley and Edgar Irving, in the New York superior court, on the following state of facts : Judgment had been entered on September 20, 1871, in favor of the plaintiffs, against Simon Stevens, in accordance with the remittitur of the court of appeals. The defendants were sureties on the undertaking on appeal to the general term.

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The complaint alleged that "Stevens hath hitherto neglected to pay the amount of the said judgment, but hath wholly refused and made default, whereby the said defendants, Horace Greeley and Edgar Irving, became and are liable to pay," &c. Demurrers were interposed to this complaint.

The plaintiffs moved for judgment, upon the ground that the demurrer was frivolous. This motion was denied at special term. The plaintiffs appealed to the general term. At the general term the appeal was dismissed, upon the ground that the order was not appealable, and the plaintiffs appealed from that order of dismissal to the court of appeals.

Amasa J. Parker, for the plaintiffs, appellants.

Dudley Field, for the defendants, respondents.—I. The order was not appealable to the general term (*Code*, § 349; *Crucible Co. v. Steel Works*, 9 *Abb. Pr. N. S.*, 195; *Fillette v. Herman*, 8 *Id.*, 193, note; *De Barrante v. Deyermant*, 41 *N. Y.*, 355; *Footte v. Lathrop*, *Id.*, 358).

II. The utmost the court can do upon this appeal is to determine whether the order was appealable to the general term. A review of the decision at special term cannot be had here at this stage of the case (*Hoe v. Sanborn*, 36 *N. Y.*, 93; *Matter of Duff*, 10 *Abb. Pr. N. S.*, 424; *People v. N. Y. Central R. R. Co.*, 29 *N. Y.*, 418).

III. The complaint did not state facts sufficient to constitute a cause of action. It does not show a demand upon the principal debtor, Stevens, nor the issuing or return of an execution. It is a well settled rule of law that the remedy against the principal must be exhausted before the surety is held liable.

THE COURT held that the order of the general term dismissing the appeal on the ground that the order was not appealable, was correct, and should be affirmed, with costs.

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BROWN *against* LEIGH.*Court of Appeals ; 1872.*

AMENDMENT OF COURSE.—CHANGING CAUSE OF ACTION.

Under section 172 of the *Code of Procedure*, a plaintiff is authorized to amend his complaint of course by setting forth a new cause of action.

This right is not restricted to setting forth a cause of action of the same class as that contained in the original complaint; but he may, by omitting the original cause of action, insert another of a different class, provided the summons be appropriate to it.*

The same principles should be applied to the amendment of answers.

Appeal from an order.

Samuel C. Brown sued Charles Leigh, in the supreme court; and in his complaint alleged that one

* Beside the cases referred to in the opinion, see *McQueen v. Babcock* (13 *Abb. Pr.*, 268; affirmed in 3 *Keyes*, 428); and *Wyman v. Redmond* (18 *How. Pr.*, 272), where it was held that even an unconscionable defense may be added to an answer, by amendment of course;—*Watson v. Rushmore* (15 *Abb. Pr.*, 51), where it was held, that a cause of action may be omitted by amendment of course;—*Thompson v. Minford* (11 *How. Pr.*, 273), where an amendment, setting forth the original consideration of the cause of action, was sanctioned; and *Strong v. Dwight* (11 *Abb. Pr. N. S.*, 319), where leave was given, on motion, to omit an admission contained in a verified answer, and to substitute a denial.

The weight of the following cases is somewhat qualified by that in our text, but, perhaps, may be sustained with it: *Gray v. Brown* (15 *How. Pr.*, 555), as to amending the prayer for relief; *Howard v. Michigan Southern R. R. Co.* (5 *How. Pr.*, 206), holding that a demurrer (coupled with an answer) cannot be omitted by amendment; *George v. McAvoy* (6 *How. Pr.*, 200), holding that a verification cannot be added to a complaint by amending.

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William F. Brown, being, on a day named, the owner in fee, and in possession of certain lands, conveyed them in fee to plaintiff. That plaintiff was the owner in fee of such lands, and in possession thereof. That defendant unjustly claimed an estate therein for not less than ten years. Judgment was demanded that defendant be declared barred of all claim to the land.

Defendant answered, denying the allegations of the complaint, and setting up that he was the owner in fee of the land and in possession thereof. Plaintiff then served an amended complaint, leaving out the former allegations and simply alleging that he was the owner of the land; that defendant was in possession, and demanded judgment for the recovery of the premises, and damages for the withholding. The amended complaint was set aside on motion, at special term, and plaintiff appealed to the general term, where the order was affirmed. Plaintiff appealed to the court of appeals.

Edward J. Maxwell, for plaintiff, appellant.—I. Under the present practice, as established by the Code and supported and confirmed by the courts, a party is at liberty, under section 172, to amend his pleading in such a manner as to entirely change the cause of action or defense. Section 172 gives authority to amend any pleadings within twenty days after the answer or demurrer to such pleading, and the only limitation imposed is to the effect that it may be stricken out if interposed for delay. Beyond this, it would seem from the very wording of the section, that the authority to amend is unlimited. But that this is the case, becomes clear beyond a doubt when taken in connection with the succeeding sections. Section 173 gives authority to the court to permit a party to amend after the time limited in the previous section, but in contrast with the latter section, provides that such amendments

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shall not change substantially the claim or defense. The plain inference to be drawn from a comparison of this limited and particular language with the broad, general, uncircumscribed language of section 172, is, that while in the latter case—namely, that of section 173—the pleading could not change the claim or defense in its nature, yet in the former case, there should be no limit whatever to the power or right of amendment. Else why did not the legislature make use of the same saving clause in section 172.

II. This construction is supported by every authority on the subject since the adoption of the section in question. The cases which decide adversely are all found to have been decided anterior to this time, and declare what was unquestionably the former practice,—namely, that a pleading could not be amended by substituting a new cause of action, or an action which could not have been united with that first set out. This rule is changed. Again: authorities may be found since the period of which we speak, which likewise seem to be adverse, but on examination of the cases it will be seen that they relate entirely to questions arising under section 173, when the power of the court was invoked, and properly, as we have seen, denied. Even under section 173, the court may amend a pleading so as to change the claim or defense, except in cases where it seeks to conform the pleadings to the facts proved (*Beardsley v. Stover*, 7 *How. Pr.*, 294, HARRIS, J.; *Troy & Boston R. R. Co. v. Tibbits*, 11 *Id.*, 168; *Bedford v. Terhune*, 30 *N. Y.*, 454; *Robinson v. Wheeler*, 25 *Id.*, 252; *Byxbie v. Wood*, 24 *Id.*, 607; 37 *Barb.*, 270; *Code R. N. S.*, 388; 1 *Abb. Pr.*, 185; 13 *How. Pr.*, 466).

P. V. R. Stanton, for the defendant, respondent.—

I. A plaintiff cannot amend a complaint by substitut-

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ing a new and different cause of action (*Woodruff v. Dickie*, 5 *Robt.*, 619; *Field v. Morse*, 8 *How. Pr.*, 47; see, also, *McGrath v. Van Wyck*, 2 *Sandf.*, 651, where the same principle is recognized by giving defendant leave to move to set aside the amended complaint as irregular; see, also, *Nosser v. Corwin*, 36 *How. Pr.*, 540, concluding paragraph of opinion). Especially and concededly is this so, where the causes are of a different class or nature, and could not be united (per BARBOUR, dissenting opinion in *Woodruff v. Dickie*, at p. 633; *Mason v. Whitely*, 4 *Duer*, 611). Here the causes of action could not be *united* (*Code*, § 167). They are not of the same class or nature, and are totally *different* and *inconsistent*, one with the other. One is to compel the determination of claim to real estate, under 3 *Rev. Stat.*, 599. The other, ejectment. The first complaint alleges *possession in plaintiff*. This, the answer denies, and avers *possession and title in defendant*. The plaintiff having obtained this advantage, the *averment of possession in defendant* by his sworn answer, now seeks by an amended complaint to substitute a new and entirely different cause of action. This the court will not allow (*Lane v. Beam*, 19 *Barb.*, 51). What the court will not allow, cannot be done *as of course* (*Spaulding v. Spaulding*, 3 *How. Pr.*, 300). This is not an "*amendment*," but a *substitution*," and is unauthorized and irregular. The case of *Bedford v. Terhune* (30 *N. Y.*, 454), does not present the same question here presented—the right to substitute an entirely new and different cause of action, such as could not be united. That was for use and occupation, and the *defense* established a lease. An action on a lease and for use and occupation, and could be united (*Code*, § 167, subd. 1 or 2). Hence, it was proper enough, under the circumstances of that case, to have allowed the

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amendment at the trial. And besides, the question arose on a different section of the Code (§ 173), and by that section, even the court is restrained from allowing an amendment which changes “substantially the claim or defense. None of the cases cited by plaintiff’s counsel meet the point presented here.

BY THE COURT.—GROVER, J.—The order is appealable to this court (*Code*, § 11, subd. 4).

Section 449 of the Code provides, that an action may be brought to compel the determination of claims to real property, pursuant to the provisions of the Revised Statutes, and that the same may be prosecuted without regard to the forms of the proceedings as prescribed by these statutes. It follows, that the same rights of amendment exist in actions brought for this purpose, as in other actions authorized by the Code.

The question arising upon this appeal is, whether, under section 172 of the Code, a plaintiff is authorized to amend his complaint by setting forth a new cause of action, and if so, whether the right is restricted to setting forth one of the same class as that contained in the original complaint. That section provides, that any pleading may once be amended by the party of course, without costs, and without prejudice to the proceedings already had within the time therein specified.

Although the construction of the section has been much discussed, it has not been determined by this court in respect to the questions involved in the present case, and the decisions by the other courts are somewhat conflicting. In some cases it has been held that the true construction was, that this section gave only the right to amend and perfect what was previously set out in an imperfect manner. That setting up a new cause of action or new defense, was in no proper sense an amendment, but substituting a new pleading. Hol-

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lister v. Livingston (9 *How. Pr.*, 140; *Field v. Morse*, 8 *Id.*, 47; *Diens v. Cary*, 3 *Id.*, 377), are all of this class. In other cases (*Mason v. Whitley*, 1 *Abb. Pr.*, 85; *S. C.*, 4 *Duer*, 611; *Prindle v. Aldrich*, 13 *How. Pr.*, 466; *Troy & Boston R. R. Co. v. Tibbits*, 11 *Id.*, 168), and others, it has been held that a new cause of action or defense might be set up.

I think the construction adopted in the former cases too strict, and subversive of the true meaning of the section, in this respect. That gives a party power to amend any pleading once, without imposing any restrictions upon it. The term pleading, includes all the pleadings of both parties. The complaint is the statement of the plaintiff's cause or causes of action. It is this statement or complaint that may be amended and perfected by the party so as to enable him to present his entire case upon trial. It is not confined to an amendment of such matter as has been defectively stated in the original complaint. The same remarks apply to the answer. This is a statement of the defense and of any counter-claim or claims. It is this statement that may be amended by the party so as to enable him to avail himself of all his defenses upon the trial.

It follows, that new causes of action may be included in the complaint, and those in the original left out, and new defenses or counter-claims embraced in the answer. That this was the intention of the legislature, clearly appears from the last clause of section 173, by which the power of the court to grant amendments upon the trial by conforming the pleading to the facts proved or restricted to such amendments as do not change substantially the claim or defense. The insertion of the restriction shows that the legislature in its absence, understood that such change might be made under the power conferred. There is no such restriction in section 172, nor upon the general power con-

ferred upon the court to allow amendments conferred by section 173.

Were the power to amend upon trial unrestricted, parties might be compelled to litigate matters of which they had no notice and for which they were unprepared, and injustice thereby done ; but there is no such danger where the amendment is made before trial, so that the adverse party may come fully prepared to trial.

It is insisted by the counsel for the respondent, that although, under section 172, a new cause of action may be set forth in the complaint, yet this can only be done when such new cause belongs to the same class as those contained in the original complaint. Section 167 of the Code declares what causes of action may be joined, and creates for this purpose seven classes, and declares that all causes of action belonging to any one of these, may be joined. Section 144 of the Code provides, that when causes of action are improperly joined, the defendant may demur to the complaint. It follows, that a plaintiff cannot, in an amended complaint, add a cause of action belonging to a different class from those in the original, retaining the latter. This would make the amended complaint demurrable under section 144, as the amended complaint, when properly served, is regarded as the complaint in the action, the same as if it were the only one that had been served. This explains the expressions in the opinions relied upon by the counsel for the respondent, that the new cause of action added, must be of the same class. But when the causes of action in the original complaint are abandoned, this reason no longer applies, it being requisite only, that the causes of action in the amended complaint should all belong to the same class. There is no other reason for restricting the causes that may be added. The causes of action in the amended complaint must, like those in the original, be warranted by the summons. If that demands a specific

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sum of money, they must all be of the class where such a summons was proper, otherwise they may be stricken out upon motion.

My conclusion is, that where the right to amend the pleading is given by section 172, the party may make the same, as advised, the same as he could the original.

This leads to a reversal of the order of the general and special term, and to a denial of the motion to strike out the amended complaint.

TURNBULL *against* OSBORNE.

City Court of Brooklyn; General Term, February,
1872.

MEMORANDUM CHECK ADMISSIBLE UNDER COUNT FOR MONEY LENT.—ADMISSIBILITY OF PAROL EVIDENCE TO EXPLAIN MEMORAN- DUM CHECK.

A memorandum check may be received in evidence under a general count for money had and received.

The word *memorandum* written across the face of the instrument, is a part of it.

Such a check is to be distinguished from the common check, and is an unconditional promise to pay the money therein mentioned, presentment and notice waived.

As between the parties, the consideration for which the check was given, may be inquired into; but that having been sufficient, and there being neither fraud nor mistake, the maker of the check is bound as principal, and cannot qualify his undertaking by proof of an oral arrangement, made at the time the check was given, that it should be paid by a third person.*

* Compare Seymour v. Cowing (1 Keyes, 533).

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Appeal from a judgment.

Joseph W. Turnbull sued Eli Osborn and Charles B. Fish in the Brooklyn city court, for six thousand five hundred dollars, money lent and advanced. The answer was a general denial.

On the trial, the plaintiff proved that on February 9, 1870, he had a check for seven thousand dollars, drawn by Mayor Kalbfleisch, of Brooklyn, and that this check he had given to Fish, and received in return three checks made by Osborn & Fish (the defendants). One of these checks was for three hundred and fifty dollars, another for one hundred and fifty dollars. Both of these had been paid. The third was for six thousand five hundred dollars, but differed from the others in that it had the word "memorandum" written across its face. The check was offered in evidence, and admitted under the objection and exception of the defendants. Defendants endeavored to show that the money advanced by Turnbull, and for which the memorandum check had been given, had really been advanced to one McBain (who was introduced as a witness), and that he had actually used the money, and that, at the time of making the loan, the plaintiff was aware that the money was for McBain, and had made no objection thereto. The referee decided in favor of the defendants, and from the judgment entered on his report, plaintiff appealed to the general term.

Crooke, Bergen & Clement, for the plaintiff, appellant.

H. B. Whitbeck, for the defendants, respondents.

BY THE COURT. — NEILSON, J. — This action was brought to recover six thousand five hundred dollars,

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claimed to have been lent and advanced by the plaintiff to the defendants. The answer denied the making of the loan or advance, thus presenting the only issue of fact arising on the pleadings.

The allegation and the denial of indebtedness went to a mere legal inference or conclusion (*Fosdick v. Groff*, 22 *How. Pr.*, 158).

On the hearing before the referee, it appeared that on February 9, 1870, the plaintiff, who held and owned the check of Mayor Kalbfleisch for seven thousand dollars, indorsed and delivered it to the defendants, and received of them their three checks; one for one hundred and fifty dollars, one for three hundred and fifty dollars, and the other for six thousand five hundred dollars. The two former, intended for present use, were paid; the latter, not to be directly paid, was noted on its face as a *memorandum* check.

On the trial before the referee, that memorandum check was properly received in evidence, under the general objection that it was irrelevant. No question was raised as to the form of the complaint, a general count for money lent and advanced, or as to the mayor's check being regarded as, in effect, equivalent to money. The questions contested on the trial were as to the undertaking of the defendants in giving this check, and whether that undertaking had been qualified by the relation which the witness, McBain, had to the original transaction, or was afterwards satisfied by McBain's having received money of the defendant.

The memorandum check is of modern use: a form of contracting where immediate payment at the bank is not contemplated, or a more formal contract not considered necessary. But, in view of its having been a late contrivance, coming into use after the rules peculiar to checks in the unqualified form and to strictly commercial paper had been well settled, and of its depending somewhat upon usage or custom,

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it is not surprising that the courts and the text-writers have not been in perfect accord as to this peculiar contract.

In a leading case in this State (*Dykers v. Leather Manufg. Bank*, 11 *Paige*, 612), the custom of Wall-street had been proved to the effect that the memorandum indicated an understanding that the check should not be presented at once, or while the drawer had no funds at the bank, and so injure his credit. In that case the letters "*mem.*" had been put on the corner of the check without the knowledge of the party to whom it was given, and were not noticed by the teller of the bank when payment was made. That payment was approved. But, in addition to the fact that the drawer was in funds at the moment, it appeared that the payee had held the check for some days. Even the Wall-street custom might well have been thus met and satisfied. But the chancellor regarded that custom as objectionable ; as an attempt by the *mem.* to convert "an ordinary check on a bank into something contrary to its legal effect," and held that the *mem.* did not affect the negotiability of the check, or the holder's right to immediate payment.

If the custom in aid of the memorandum were invoked "to change the check into something contrary to its legal effect," the objection would be insuperable. A custom should not be in conflict with the rules and principles of law. A contract is to be respected, not only in view of its terms, but of its legal effect ; and that legal effect can no more be changed or contradicted by parol than its express terms may be. The check on a bank states no day for the presentation or payment of it, but the law supplies the omission, and what the law supplies is, in effect, part and parcel of the contract.

In the absence of such an objection, the custom or usage may perform an important office, especially

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where the parties have contracted with reference to it, where its nature and effect are just and reasonable, or where the meaning of words or phrases which have acquired some special or technical sense in trade or commerce, becomes material. But, going beyond such instances, the right to call in the usage or custom is exceptional, and of little value. If, pushing the claim to the extreme, it should be said that much of what is now regarded as settled law, many rules and presumptions acted on by bankers and merchants, had their origin in mere experience, in the wants and convenience of men as exemplified in trade or commerce; that, in the progress of a gradual development, usage had ripened into custom, custom into law;—first the blade, then the ear, then the full corn in the ear;—that though we cannot add to the common law, there may be expansions and novel applications of that law, and that it might not be wise to assign arbitrary limits to that development, or to act upon the assumption that the usage or custom of more recent origin may not be as reasonable, as well adapted to the nature and fitness of things as the customs which have long since received general adoption, — still restraints and limitations would be met with at every step in the argument. In accepting any new application of a principle, as illustrated by usage or custom, that which has been already established must remain; the new may not be built upon the ruins of the old.

The first step, therefore, towards the recognition of the custom in question, is to give significance to the fact that the word "memorandum" thus written on the face of the check is a part of the contract. In this instance that word was written by the drawer when the check was made and delivered. The parties knew what was intended; what the memorandum signified. Why does that word appear on the face of the paper? It was written for some purpose,—for what purpose?

May it not be read in connection with the other words in the light of the well known custom ; not indeed as a word having no special sense, or as hostile to the contract, but to carry out the intention of the parties by giving effect to what has been written ? If the custom cannot work out that, it performs no office whatever, and the memorandum on the face of the check goes for nothing.

The objection that the custom seeks to give such effect to the *memorandum* as to convert the common check on a bank into something else, thus changing the legal effect, presupposes that a check in the common form has been made, and is thus sought to be transformed. With deference, that view is erroneous. It may be assumed that this memorandum check was made as such instruments usually are. The defendants did not make a common check to be changed to something else, but made this check in the form in which it now appears. The objection due to the act of altering the contract by adding, erasing, or tearing off words and terms, or of bringing in by the custom, or otherwise, something extraneous to subvert or modify the contract, does not apply. The question would rather seem to be, whether a portion of what the parties thought proper to add or annex, as part of the instrument, can be overlooked, and a change not contemplated by the parties be thus imposed.

The argument, if not the ruling, in *Dykers v. Leather Manuf. Bank* (*supra*), repels the notion of distinguishing between the special and common check.

That distinction, recognized in *Skilman v. Titus* (3 *Vroom*, 96), was clearly stated in *Franklin Bank v. Freeman* (16 *Pick.*, 535). In the latter case (p. 539 of op.), Mr. Justice PUTNAM says : "A memorandum check is a contract by which the maker engages to pay the *bona fide* holder absolutely, and not upon a condition to pay if the bank upon which it be drawn should

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not pay upon presentation at maturity, and if due notice of presentation and non-payment should be given. The word 'memorandum,' written or printed upon the check, describes the nature of the contract with precision."

Some elementary writers, in stating the rule that custom or usage is not respected if contrary to the law applicable to contracts, assume that the custom as to memorandum checks is within that rule. Other and later writers take quite another ground.

In *Story on Prom. N.*, § 499, it is said that these memorandum checks, as between the parties thereto, seem designed as mere evidence of indebtedness, and are in the nature of the common due bill.

EDWARDS, in his work on *Bills and Notes* (2 ed., 754), has a like statement.

And Mr. PARSONS, referring to the ruling in *Dykers v. Leather Manuf. Bank* (*supra*), that the *mem.* written on the check does not affect the rights of the holder, says: "We think this might have been doubted, because there is a well known custom in all our commercial cities of drawing and using checks in this form merely as due bills" (2 *Pars. on Notes and Bills*, 66).

And a yet later writer says: "*Memorandum checks*, so called, are instruments of quite common use in business circles. . . . As between the drawer and the drawee they are a species of evidence of indebtedness" (*Morse Treat. on Banks and Banking*, 312).

But it may be stated that with us the memorandum check is negotiable, and, if presented at the bank when the drawer has funds, may be paid as other checks may be; that no term of credit can be imputed, preventing the holder from exacting payment within a reasonable time; and that the memorandum operates as a waiver of presentment and notice, the contract being an unconditional engagement to pay the money.

It would seem to follow, that in other respects the memorandum inures to the benefit of both parties. The party receiving such a check could not, as in the case of a check proper, claim that he had been defrauded, if the drawer had no money in the bank to be applied in payment ; nor could the drawer claim to be relieved from his obligation by reason of negligence, should the bank fail, after reasonable time for the presentation of the check had elapsed. These, and the like consequences, result from the waiver of which the " memorandum " is declarative.

The contention in this case having been between the parties to the original transaction, the consideration for which this memorandum check was given, was open to inquiry. That consideration having been sufficient, and there having been neither fraud nor mistake, the defendants who had signed their names as principals, became bound as such. It was no more competent for them to show that although they had given their three checks for, and on receiving the seven thousand dollars, it was then and there understood and agreed, that *they* should not pay the checks, or that *McBain* should pay them, than it would be for the maker of a promissory note, by such proof, to relieve himself from all liability.

The theory of the defense was, that the loan had been made to *McBain*, or to the defendants by and for him ; and with that view, proof was taken as to his having been instrumental in inducing the plaintiff to get the money of the mayor to be placed with the defendants. But that loan was obtained by the plaintiff of the mayor, upon his own note, and the pledge of his collateral securities. *McBain* had no interest whatever in the check, and no claim upon its proceeds ; and his application to the plaintiff to make the loan, seems to have been on behalf of the defendants. But no question of agency was involved. After obtaining the

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mayor's check, the plaintiff met one of the defendants in the register's office, and transacted the business with him personally, by delivering that check, and receiving of the defendants their three checks—an exchange of paper. At the moment of that exchange, the rights and obligations of the parties were fixed unconditionally.

The plaintiff's understanding was, that the defendants wanted to improve the appearance of their bank account. He says that McBain and Fish so represented. Even McBain, called as a witness, says, "I said to Mr. Turnbull that I wanted the money to place with Osborn & Fish. I told him that I was under obligations to them, and wanted to place it there. My intention in putting the money there was to do them a favor so that their bank account would stand better." All that was quite consistent with a friendly interest in the defendant's standing at the bank, and with the fact that the money going from the plaintiff to them for their accommodation, was to be repaid by them.

The statement of McBain, that he placed the money with the defendants, cannot be reconciled with the conceded events, the controlling facts in the case.

The intent of the parties, the character of the transaction, and the consequent claim and liability, are best deduced from the papers exchanged. But that intent could also be gathered from the proofs at large, from the acts and the omissions. If this was a loan to McBain, what occasion was there for the intervention of the defendants? Why did not he, rather than they, receive the mayor's check and give the plaintiff his checks for the two small sums, his memorandum check for the balance? If this were not a loan to the defendants, why did they receive the seven thousand dollars of the plaintiff and give their checks in exchange?

The testimony taken with a view to substitute McBain as the debtor in the place and stead of the defend-

ants, was in no sense material. In McBain's testimony, he attempts to take the attitude of a debtor, to give assurances of payment, but he has not paid the debt. If a debtor at all, he was so to the defendants, for the money received of them. Of what moment was it that his memorandum check was mentioned, perhaps considered desirable security, the plaintiff having accepted the defendant's check, McBain assuming no responsibility? Of what moment that McBain said he would pay the interest charged by the mayor, he not having bound himself to pay the principal and interest now in question? Or that, immediately upon the exchange of the paper, Fish spoke of letting McBain have the money, did let him have three thousand five hundred dollars that day, and the residue soon afterwards? Or that, without the plaintiff's interference or power of control, they kept their accounts in the manner stated? If the defendants had regarded the money advanced to McBain as in payment of the plaintiff's claim, they should have obtained his express consent to that, have taken up this check, and required McBain to give or substitute some other security. As prudent men, they would have done so.

Upon the exchange of the papers, the defendants acquired title to the check for seven thousand dollars, and had the power to apply the money as they thought proper. Whatever use they may have made of it, their obligation to pay the amount represented by this memorandum check remained as an original and unqualified undertaking.

We think that the judgment entered on the referee's report should be reversed, and a new trial granted, costs to abide the event.

Judgment accordingly.

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NEGLEY *against* DEVLIN*New York Superior Court; Special Term, 1872.*LOTTERIES.—ACTION FOR MONEY RECEIVED UNDER
ILLEGAL CONTRACT.

Proof that a ticket issued by the managers of a concert stated that the bearer was entitled "to admission to a grand concert . . . and to whatever gift might be awarded to its number," to which was added the number of the ticket,—*Held*, to show beyond a reasonable doubt that the enterprise was a lottery within 1 *Rev. Stat.*, 664. A person who was employed to sell lottery tickets, after having sold a quantity of tickets, refused to pay over the money,—*Held*, that as the lottery was illegal, every contract made in furtherance thereof was void, and that no action would lie to recover back the money.

Motion to vacate an order of arrest.

James S. Negley sued Patrick C. Devlin in the New York superior court, and obtained an order of arrest against the defendant.

The affidavit on which the order was granted alleged that at the city of Washington, D. C., a grand gift concert and distribution was organized and formed, the net proceeds of which were to be appropriated and applied for the benefit of the Foundling Asylum of the Sisters of Charity, in the city of New York, and the Soldiers' and Sailors' Orphans' Home, of Washington, D. C., of which enterprise or scheme the plaintiff was appointed sole trustee for holding the funds which might be realized from the sale of the tickets, and the proper distribution of the proceeds. That the defendant was appointed the general agent for the sale of the

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tickets, and had sold tickets to a large amount, and had refused to pay over the proceeds thereof, &c.

The defendant on this motion alleged that the enterprise or scheme was a *lottery*, within the prohibition of the statutes of this State ; and, in support of such allegation, averred that it was managed by certain persons, whose names appeared in a certain handbill annexed to his affidavit, which had been published and issued "by and on behalf of said managers." Such handbill was headed with the figures "\$260,000. Grand gift concert and distribution for the benefit of," &c. Then followed : "After the concert, the following gifts will be awarded to the successful ticket holders," &c., giving a list of real estate, bonds and cash, constituting one thousand and three gifts.

The tickets issued by the managers were as follows :

"The bearer is entitled to admission to a grand concert, for the benefit of . . . to be held in Washington, D. C., on . . . and to whatever gift may be awarded to its number. Tickets, \$5 each. No. 35797."

[Signed, &c.]

The plaintiff denied that the handbill was issued or authorized by the managers, and alleged that it was published by the defendant. He did not, however, deny that the contents of the handbill were true, or that the *ticket* was one issued by the managers. And the only allegation in opposition to the proof furnished by the defendant that it was a *lottery*, was the general averment that it was not intended as a cover, but was in all respects a just, legal and fair scheme.

T. Bracken, for the motion.

Mr. Hamilton, opposed.

MONELL, J.—I am quite satisfied, upon all the evidence furnished on this motion, that the enterprise or

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scheme set on foot in Washington, and having for its object the realizing of funds for the two charities named, was a *lottery* within 1 *Rev. Stat.*, 664, and was, therefore, an unlawful scheme. Looking only at the ticket, which, it is conceded, was issued by the managers, and which was sold by the defendant, there cannot be any reasonable doubt that the enterprise was of a character which brought it within the prohibition of the statute. But when taken in connection with the other proofs, the case becomes entirely clear.

The effect of the prohibition by the statute, is to render every contract or transaction connected with this unlawful scheme, wholly void, and of no effect; and more especially so, when the contract is to aid in the violation of the statute (*De Groot v. Van Duzer*, 20 *Wend.*, 390; *Rolfe v. Delmar*, 7 *Robt.*, 80).

In this case, the managers engaged in an unlawful enterprise, and employed the defendant to assist them in their violation of the law. Their own acts, in setting the lottery on foot, being, therefore, *malum prohibitum*, their contract with the defendant cannot be enforced, and the plaintiff cannot maintain this action.

The object of the scheme, and the purpose to which it was designed, to bestow the proceeds, were such as commended them to a most favorable consideration. But the worthiness and excellence of the charities, does not remove the vice from the enterprise, or make it lawful and proper.

The result is, that the motion must prevail.

GRAY *against* FISK.

New York Superior Court; General Term, June, 1871.

REFEREE'S REPORT.—IRREGULARITY.

The charges upon which a motion to set aside a referee's report for improper conduct with the successful attorney, undue influence, &c., is based, must be affirmatively proved.

A report cannot be set aside upon mere suspicion or surmises, especially when these are founded on alleged previous improprieties with the unsuccessful side.

Appeal from judgment entered upon the report of a referee in favor of James Fisk, Jr., William Belden, and William D. Bradford, defendants, and from an order of the special term denying motion of George F. Gray, plaintiff, to set aside the referee's report upon the alleged grounds :

1. That the report was procured by improper means ;

2. That it was different from what the referee had told plaintiff's counsel it would be ; and,

3. That the referee changed his opinion in a manner that was improper, and renders the report invalid.

Titus B. Eldridge, for the plaintiff, appellant.

Field & Shearman, for the defendants, respondents.

BY THE COURT.*—FREEDMAN, J.—Plaintiff's exceptions to the admission and rejection of evidence upon the trial, are clearly untenable.

* Present, JONES, McCUNN and FREEDMAN, JJ.

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All other questions arising upon the appeal from the judgment, and the order denying plaintiff's motion to set aside the report of the referee, resolve themselves, upon a critical examination, into mere questions of fact. Most of these have been determined against the plaintiff, upon conflicting testimony ; and the rest, —to wit: those upon the motion,—were evidently decided adversely to him, because of his failure to substantiate the charges preferred. Upon the whole case we are unable to perceive a sufficient reason to interfere with the determination actually made. The supplemental affidavit sworn to by defendants' counsel on December 1, and offered to be handed up as an additional paper in support of the motion, should, perhaps, have been received by the court below, and we have, for that reason, treated it as part of the case made by the plaintiff, and given to the facts therein alleged due consideration, without being able to arrive at any other conclusion than the one already stated. Whatever improprieties the referee has been guilty of, were, according to the evidence, committed with the attorney of the party dissatisfied with the report, and there is no evidence from which, in the face of the explicit denial of the referee, the law would tolerate the inference that undue influence has been brought to bear upon him by the party in whose favor he finally decided. The law never presumes a wrong. Undue influence must, consequently, be affirmatively established by the party making the charge. In each of the cases cited by plaintiff (4 *How. Pr.*, 253 ; 9 *Id.*, 1 ; 12 *Id.*, 297), it clearly appeared that the referee had been guilty of some irregularity with the party in whose favor he finally decided ; and no case can be found in which a report was set aside, as demanded by considerations of public policy, upon the sole ground of improper transactions between the referee and the unsuccessful party. On the contrary, in *Ayrault v. Sackett*

(17 *How. Pr.*, 507), in which case the referee had come to a conclusion in his own mind, which he expressed to defendant's counsel, and which he committed to paper in the form of an opinion, it was distinctly held by the general term of the supreme court that until a referee has signed his report, and notified the party entitled to it of that fact, the case is under his control, and he may reconsider his decision and change it. While, therefore, we concede that for the purpose of maintaining the purity of the administration of justice, the report of a referee may and should be set aside upon even slight proof of improper dealings between him and the successful side, provided such dealings are shown to have had a tendency, no matter how remote, to influence the action of such referee in favor of such party, we cannot go to the length of holding that a report can be set aside upon mere suspicion or surmise, founded upon previous improprieties with the unsuccessful side. A rule of this strictness would hold out an incentive to a party anticipating an unfavorable report to inveigle the referee into the commission of some impropriety of speech or action, with the view of using the same as the foundation for the subsequent impeachment of his report, in case that should prove unfavorable.

For the same reason, the rule has always been, in the case of a jury, that if, before they be agreed on their verdict, they eat or drink at the charge of the plaintiff, if the verdict be given for him, it shall avoid the verdict. But if it be given for the defendant it shall not avoid it, and *sic e converso*. And if, after they be agreed on their verdict, they eat or drink at the charge of him for whom they find, it shall not avoid the verdict (*Coke on Litt.*, 227, b).

The change of mind on the part of the referee in this case was not therefore of a character to render the

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subsequent report invalid, but merely reviewable upon appeal from the judgment.

The judgment and order appealed from should be affirmed, with costs

COIT *against* STEWART.

Supreme Court; General Term, Second District, Second Department, 1872.

ACTION ON CONTRACT.—COUNTER-CLAIM.

An answer alleging that plaintiff agreed to act as defendant's agent in the purchase of bonds, and to account for all money coming to his hands, but that after receiving a specified sum, he would not account, &c., but appropriated the same to his own use, whereby he became indebted, &c., and demanding judgment in the sum specified, may be regarded as a cause of action on contract; and constitutes a proper counter-claim in an action on contract.*

Appeal from a judgment.

William A. Coit sued Joseph B. Stewart in the supreme court, to recover on two promissory notes made by defendant. In the answer, a fourth defense was set up, in substance, as follows:

Since in or about the year 1866, the said plaintiff has been continually acting as the broker and agent of this defendant, and conducting negotiations for him in his various business transactions, and acting

* Compare *Elwood v. Gardner* (10 *Abb. Pr. N. S.*, 238), and *Knapp v. Meigs* (11 *Id.*, 405), where a somewhat different rule is applied in case of application for provisional remedies.

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throughout in a fiduciary capacity for this defendant, for a compensation ; and said plaintiff agreed with this defendant to carry out for this defendant, and as this defendant's agent and trustee, a certain negotiation, for the purchase of certain bonds, to the amount of about one hundred and seven thousand dollars, of the Alexandria and Fredericksburg Railroad Company, from various holders with whom defendant had negotiated for their purchase ; and thereupon, said plaintiff entered upon the said negotiation, as such agent and trustee of defendant, and for defendant's benefit, and conducted the same to the termination thereof ; and the said plaintiff then and there agreed with defendant, well and faithfully to discharge his duties as such agent and trustee, and faithfully to account with and pay over to defendant, for all the moneys, property or securities which might come to the hands of said plaintiff in the course of his said employment ; but the said plaintiff, disregarding his duty and agreement, after receiving the moneys, funds and securities of this defendant, to the amount of about eighty thousand dollars or thereabouts, did not, nor would, account for the same or any part thereof, to or with this defendant, or pay over the same or any part thereof, to him or for his benefit, or at his request, but appropriated the same to his own use and benefit, and thereby became, and was, and still is, indebted to this defendant, in the said sum of eighty thousand dollars, or thereabouts, for the said moneys, funds and securities of this defendant, which, so as aforesaid, came to the hands of, and were received by the said plaintiff, to and for the use of this defendant, and for which the said plaintiff had, so as aforesaid, agreed to account to and with this defendant ; whereby an action has accrued in favor of this defendant, against the said plaintiff, to recover from the said plaintiff the sum of eighty thousand dollars, together

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with the interest thereon, from June 7, 1870. Wherefore, this defendant, by way of counter-claim, demands judgment against said plaintiff, for the said last-mentioned sum, and interest, together with the costs of this action.

The plaintiff demurred to this defense, "which purports to set up a counter-claim herein," and alleged as the grounds of said demurrer, that said matters as stated, did not upon the face thereof constitute a counter-claim or defense in this action; in this, to wit:

"1. The matters set up, if true, constitute a tort, in the wrongful conversion of the defendant's property.

"2. It is alleged by defendant in said answer that plaintiff acted in said matters in a fiduciary capacity to defendant, as his agent and broker.

"3. The value of said alleged securities and property are uncertain, and said pretended claim is solely for unliquidated damages."

Judgment on the demurrer was ordered at special term, and defendant appealed to the general term.

Lucien Birdseye, for defendant, appellant.—I. The matters set up in the fourth defense constitute a "cause of action arising on contract," and not out of any *tort*. 1. Every such allegation as was necessary to constitute a cause of action for a *tort* or *wrong*, is seen to be carefully eliminated from the answer. 2. There is a positive averment of an express contract, as well as a statement of facts which create in law an implied contract. There is, then, an averment of the fact and manner of the breach of this contract, to wit: the refusal to account and pay over, and the appropriation of the defendant's moneys to the plaintiff's own use. 3. Such allegations, if in a complaint, would give the party pleading them, such rights as arise in an action *ex contractu*, and not as in an action arising *ex*

delicto (Austin v. Rawdon, 44 N. Y., 63; Conaughty v. Nichols, 42 Id., 83).

II. Even if the allegations demurred to show the plaintiff to have been guilty of a legal wrong, and therefore liable to be sued in an action for the conversion of defendant's moneys, still defendant may waive that tort and sue on contract (Hinds v. Tweddle, 7 How. Pr., 273, 281; Chambers v. Lewis, 10 Abb. Pr., 206; S. C., 2 Hilt., 591; S. C., affirmed on appeal, 11 Abb. Pr., 210; Hawk v. Thorn, 54 Barb., 164; Roth v. Palmer, 27 Id., 652, and cases cited, p. 655; Kayser v. Sichel, 34 Id., 84; affirmed in court of appeals as Wigand v. Sichel, 33 How. Pr., 174; S. C., 3 Keyes, 120).

III. Not only may the party suing as plaintiff waive the tort and sue on contract, but a defendant when sued may also waive the tort and sue upon the contract (International Bank v. Monteith, 39 N. Y., 297).

IV. Several cases are cited by the plaintiff to show that a tort cannot be set up as a counter-claim in an action on contract. These cases, or most of them, are well decided, because out of the several torts referred to in these cases no implied contract arose in favor of defendant. Thus in Drake v. Cockroft (4 E. D. Smith, 34), the tort complained of was a trespass and destruction of personal property; not the receipt of a thing of value, enjoyed by defendant, and for which the law implied a promise to pay. So in Edgerton v. Page (14 How. Pr., 116; S. C., 1 Hilt., 320; 5 Abb. Pr., 1; affirmed in court of appeals, 18 How. Pr., 359). The tort complained of was negligence in the landlord in allowing filthy water to flow by defective pipes into the premises of defendant, for the rent of which action was brought. The dictum of WOODRUFF, J., in Mayor, &c. of New York v. Parker Vein S. S. Co. (12 Abb. Pr., 300, 302), if not founded on the

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frame of the alleged counter-claim, as one stating merely a tort, is overruled by the court of appeals in *International Bank v. Monteith*, and *Wigand v. Sichel*, (*supra*).

James Troy, for plaintiff, respondent.—I. The action is on contract. No authorities are necessary to establish this proposition. The counter-claim is in tort (see 2 *Burr. L. Dic.*, Tort; *Bouv. L. Dic.*, 590; 1 *Fonbl. Eq.*, and article Injury; 3 *Black. Com.*, 117; *Code*, § 179; *Elwood v. Gardner*, 10 *Abb. Pr. N. S.*, 238; *International Bank v. Monteith*, 39 *N. Y.*, 297, 300; *Drake v. Cockroft*, 4 *E. D. Smith*, 34; *Edgerton v. Page*, 14 *How. Pr.*, 116; *Mayor v. Parker Vein S. S. Co.*, 12 *Abb. Pr.*, 300; *Edgerton v. Page*, 1 *Hill.*, 320; *S. C.*, 5 *Abb. Pr.*, 1; *S. C.*, 18 *How. Pr.*, 359; *Patison v. Richards*, 22 *Barb.*, 143; *Bennett v. Parker*, 16 *N. Y.*, 251). Before the Code a cause of action on the case could not be set up as a set-off, recoupment or counter-claim in an action of assumpsit. The Code, by section 150, now regulates this matter. The section has two subdivisions. It permits to be counter-claimed—1. A cause of action arising out of the contract or transaction set forth in the complaint, or connected with the subject of the action. 2. In an action on contract any other cause of action arising on contract, when such causes of action existed in favor of a defendant and against a plaintiff at the time of the commencement of the action. A tort cannot therefore be set up as a counter-claim in an action on contract (see 4 *E. D. Smith*, 34; 1 *Hill.*, 320; 5 *Abb. Pr.*, 1; 18 *How. Pr.*, 359; *DeLeyer v. Michaels*, 5 *Abb. Pr.*, 203; 39 *N. Y.*, 383; 22 *Barb.*, 143; 14 *How. Pr.*, 116; 12 *Abb. Pr.*, 300).

BARNARD (J. F.), J.—I think the fourth defense to the plaintiff's complaint set up only a contract. It

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avers an agreement made between the defendant and the plaintiff as his broker ; that by virtue of and under this agreement, the plaintiff, after receiving money and other property of defendant, refused to account to defendant, and appropriated the same to his own use, and thereby became "indebted to this defendant, whereby an action has accrued." This is a pure contract (*Austin v. Rawdon*, 44 *N. Y.*, 63 ; *Conaughty v. Nichols*, 42 *Id.*, 83).

Even if it was a tort, an action for money had and received has always been permitted when money has been received for converted property.

The order should be reversed, with costs.

TAPPEN, J., concurred.

Order reversed, with costs

HOFFENBERTH *against* MULLER.

New York Common Pleas, Special Term ; August,
1871.

APPEAL FROM MARINE COURT.—SERVICE OF NOTICE.
—EXTENSION OF TIME FOR APPEAL.—WAIVER.

The statute (*Code of Procedure*, § 354) requiring notice of appeal from the marine court of New York city to the common pleas, to be served on the clerk of the marine court, is satisfied by a service at the office of the clerk of the court upon a person duly authorized to receive the same. It need not be served on the clerk personally.

The omission to make service upon the respondent in person, provided for by the same section (*Code*, § 354), is not fatal to the appeal ; but, if the appeal is taken in good faith, is amendable.

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An attorney, by his general authority, may, after judgment rendered, give a stipulation allowing an extension of the time to perfect an appeal.*

Motion to dismiss an appeal.

Charles Hoffenberth sued John T. Muller, in the marine court, and on April 4, 1871, judgment was entered in favor of the defendant. On the 24th the defendant's attorney consented in writing that the plaintiff have twenty days' further time to serve case and perfect appeal to the court of common pleas. Before the expiration of that twenty days, the appellant served the notice of appeal upon the deputy clerk of the marine court, and upon the respondent's attorneys but did not serve the same upon the respondent personally, as required by section 354 of the Code.

A motion was now made to dismiss the appeal: 1. Because notice of appeal was not served within the statutory time, the attorneys having no power to release the same. 2. Because the notice of appeal was not served upon the clerk of the marine court, but upon his deputy. 3. Because no copy of the notice of appeal was served upon respondent.

O. F. & J. C. Shaw, for the motion.

Lewis Sanders, opposed.

* Compare *Barrett v. Third Ave. R. R. Co.* (45 *N. Y.*, 628, affirming 8 *Abb. Pr. N. S.*, 205), holding that an attorney's general power does not extend to a compromise or release of the cause of action. *Carstens v. Barnsdorf* (11 *Abb. Pr. N. S.*, 442), holding that it does not extend to satisfying judgment, nor to releasing one of several defendants without payment. *Read v. French* (28 *N. Y.*, 285), holding that he has power, even contrary to instructions, to consent to open a default obtained by fraud. *Tiffany v. Lord* (40 *How. Pr.*, 481), countenancing his power to consent to a reference of an action not referable without consent. *Eagan v. Rooney* (38 *How. Pr.*, 121), holding that on entry of judgment the authority of defendant's attorney ceases.

VAN BRUNT, J.—As to the second ground upon which the dismissal is asked, it seems to me that the statute is complied with by a service at the office of the clerk of the court, upon a person duly authorized to receive the same, and that it is a good and sufficient service upon the clerk. It would be frequently requiring an impossibility to insist upon a personal service upon the clerk. The object of the statute is complied with by a service at the office of the clerk, upon the person in charge thereof, during office hours. I therefore think that this point is not well taken.

The third point is well taken. The statute distinctly requires service of the notice of appeal upon the respondent personally, and this cannot be dispensed with; but an omission to make such service is not fatal to the appeal, but if the appeal is taken in good faith, has always been considered amendable (*Williams v. Tradesmen's Fire Ins. Co.*, 1 *Daly*, 322).

The first ground upon which this motion is founded seems to be of greater gravity. It has been frequently held that the court has no power, either directly or indirectly, to extend the time for the perfecting an appeal (*Humphrey v. Chamberlain*, 11 *N. Y.* [1 *Kern.*], 274; *Wait v. Van Allen*, 22 *Id.*, 319; *Salles v. Butler*, 27 *Id.*, 638); and it was urged that the attorneys had no power by stipulation to extend the time; that the only power which an attorney has after a judgment has been entered is that conferred by statute of satisfying the same; and that the attorneys, in stipulating to extend the time to perfect the appeal, exceeded their powers; and that the respondent was not bound by the stipulation. This is no longer an open question in this court. In the case of *Struver v. Ocean Ins. Co.* (9 *Abb. Pr.*, 23; *S. C.*, 2 *Hilt.*, 475), this identical question has been passed upon. The court there held that if the attorneys admitted *due* service of a notice of appeal, it amounted to a waiver of the objection that the notice of appeal

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was not served in time. It seems to me that the principle involved in the case cited and the one now under consideration are identical. It is a stipulation in both cases. In the one case it is a waiver of a default already made, and in the other it is an agreement that they will waive the default and accept due service of the notice of appeal after the statutory time has expired.

The motion is granted with costs, unless the appellant desires to perfect his appeal by service of the notice upon respondent; in which case, upon payment of the costs of this motion, he is allowed, within ten days from service of a copy of this order, to serve the same *nunc pro tunc*.

 RAPHAELSKY *against* LYNCH.

New York Superior Court; General Term, December, 1871.

GRANTING NEW TRIAL ON NEWLY DISCOVERED EVIDENCE AFTER JUDGMENT.

Evidence of a conspiracy between plaintiff and his witnesses, to falsely date instruments material to the case, in order to sustain the action;—*Held*, not cumulative, and a good ground for granting a new trial, when applied for immediately upon its discovery.

The court has power under the act of 1832 (*Laws of 1832*, ch. 12, § 1), to grant a new trial on motion even after judgment.*

* To the same effect, beside the cases cited in the opinion, is *Blydenburgh v. Johnson*, 9 *Abb. Pr. N. S.*, 459.

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Morris Raphaelsky sued James Lynch, in the New York superior court, for the conversion of certain cases of tobacco, which the defendant, as sheriff of New York county, had, on January 7, 1864, seized under an attachment against William Salamon.

The tobacco at the time of the seizure was in store, and a warehouse receipt therefor had been made to James Parker. At the time of the trial the receipt bore the following indorsements: "James Parker to J. Cooper," "John Cooper," "Philip Franklin." Plaintiff claimed to have purchased the tobacco from Franklin, and received the receipt from him. On the trial Parker swore the tobacco belonged to Salamon for whom he acted, that Cooper was his (Parker's) clerk and sold the tobacco for him. Franklin swore that he bought the tobacco from Cooper, and sold it to plaintiff by indorsing and transferring the warehouse receipt. A bill of sale from Franklin to plaintiff, dated January 4, 1864, was produced and put in evidence. Plaintiff had a verdict, on which judgment was entered. After the entry of judgment, defendant, claiming to have discovered evidence showing that the bill of sale had been falsely dated in pursuance of a conspiracy between plaintiff and the witnesses, gave notice of motion for a new trial. Pending the hearing of this motion, defendant obtained an order from SPENCER, J., opening and setting aside the judgment so far as to allow defendant to make the motion for a new trial. The motion for new trial was denied on the ground that it was made too late after judgment had been entered. Defendant appealed to the court at general term.

A. J. Vanderpoel, for defendant, appellant.—I. The practice adopted by the defendant in applying to have the judgment opened, and for leave to make the motion for a new trial, was authorized by and was in accordance with the decision of this court in the case

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of Stilwell v. Staples (4 Robt., 639). A court possesses an inherent power over its own judgments, and can, where justice requires it, vacate a judgment in order to relieve a party from technical difficulty (Per WOODRUFF, J., in court of Appeals in Folger v. Fitzhugh, 41 N. Y., 228, 231).

II. Even if the judgment had not been opened by previous order, the court should have heard and decided the motion upon the merits (Folger v. Fitzhugh, 41 N. Y., 228; Tucker v. White, 27 How. Pr., 97; Tucker v. White, 28 Id., 78, where all the decisions on the subject to that date are cited and commented upon; Blydenburg v. Johnson, 9 Abb. Pr. N. S., 459).

III. Upon the merits the defendant is clearly entitled to a new trial. (1.) The newly discovered evidence is material to the issue—it goes to the merits of the case, and is not cumulative. (2.) The evidence was not discovered until after the trial. Defendant was not able to discover it before. He used great diligence in obtaining testimony for the trial, and is not guilty of laches (Oakley v. Sears, 1 Robt., 73; Adams v. Bush, 2 Abb. Pr. N. S., 104, 110; Quinn v. Lloyd, 1 Sweeny, 253; Jackson v. Laird, 8 Johns., 489).

John S. Woodward, for plaintiff, respondent.—I. Motions for a new trial upon a *case and exceptions*, or upon the ground of surprise, or *newly discovered evidence*, must be made *before*, and *cannot* be made *after* judgment absolute has been entered (Jackson v. Fassit, 21 How. Pr., 279; J. CLERKE, 280; S. C., 33 Barb., 645; Peck v. Hiller, 30 Id., 655; Sheldon v. Stryker, 42 Id., 284, 287–8; S. C., 27 How. Pr., 387; Jackson v. Chase, 15 Johns., 354; Anthony v. Smith, 4 Bosw., 503; Barnes v. Roberts, 5 Id., 73, 78, 80; Magnus v. Tritchett, 2 Abb. Pr. N. S., 175; Gurney v. Smithson, 7 Bosw., 400; Anderson v. Dickie, 26 How.

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Pr., 199; *S. C.*, 17 *Abb. Pr.*, 83; *Stilwell v. Staples*, 4 *Robt.*, 639).

II. The defendant has been guilty of great and inexcusable negligence in obtaining his testimony claimed to be newly discovered (4 *Graham & W. on New Trials*, 462, 472, 483-4; 3 *Id.*, 1026-7; *People v. Myers*, 10 *How. Pr.*, 261; *Leavy v. Roberts*, 8 *Abb. Pr.*, 310; *People ex rel. Oelricks v. Superior Court, &c.*, 10 *Wend.*, 285, 289, 291). Such motions are granted with reluctance (3 *Graham & W.*, 1083-4-5). The evidence must have been discovered since the trial (*Oakley v. Sears*, 7 *Robt.*, 112; *Dodge v. N. Y. & Washington S. S. Co.*, 37 *How. Pr.*, 524; *S. C.*, 6 *Abb. Pr. N. S.*, 451; *Adams v. Bush*, 2 *Id.*, 104; *Meyer v. Fiegel*, 38 *How. Pr.*, 424; *Quinn v. Lloyd*, 1 *Sweeny*, 253).

III. The newly discovered evidence is wholly immaterial and cumulative (*Barrett v. Third-avenue R. R. Co.*, 1 *Sweeny*, 568).

IV. Newly discovered evidence which goes merely to impeach the credit of witnesses examined on the trial is no ground for a new trial. It is not material within the rule (*Beach v. Tooker*, 10 *How. Pr.*, 297; *Meakin v. Anderson*, 11 *Barb.*, 216; *Powell v. Jones*, 42 *Id.*, 24).

V. A new trial will not be granted where such evidence merely goes to disprove what was sworn to on the former trial, nor where it is to a fact controverted on the former trial, nor where it is merely cumulative (*Fleming v. Hollenback*, 7 *Barb.*, 276; *People v. Superior Court, &c.*, 10 *Wend.*, 285, 291-293; *Meakin v. Anderson*, 11 *Barb.*, 215, 223-4; *Harrington v. Bigelow*, 2 *Den.*, 109; *Brisbane v. Adams*, 1 *Sandf.*, 195-8; *Halsey v. Watson*, 1 *Cainss*, 24; *Pike v. Evans*, 15 *Johns.*, 212, 213; 1 *Graham & W. on New Trials*, 495-6, 472, 478; 3 *Id.*, 1074, 6, 7, 8; *Tripler v. Ehehalt*, 5 *Robt.*, 609-10; *Sproul v. Resolute Fire Ins. Co.*, 1 *Lans.*, 71).

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VI. A new trial will not be granted in any case on the ground that the verdict is against evidence, when the testimony is conflicting or where there is evidence on both sides,—unless the verdict so strongly preponderates against the evidence as to evince passion, prejudice, &c., on the part of the jury (*Murphy v. Boker*, 3 *Robt.*, 1; *De Fonclear Shottenkirck*, 3 *Johns.*, 170; *Easten v. Benton*, 2 *Hill*, 576, 578; *Keeler v. Fireman's Ins. Co., of Albany*, 3 *Id.*, 251; *Fleming v. Hollenbeck*, 7 *Barb.*, 271; *Hall v. Morrison*, 3 *Bosw.*, 520; *Lewis v. Blake*, 10 *Id.*, 198; *Arnoux v. Homans*, 25 *How. Pr.*, 427; *Cothan v. Collins*, 29 *Id.*, 155).

VII. The court has no power to extend the time to appeal from a judgment either directly or by setting it aside and directing the entry of a new judgment (*Caldwell v. Mayor of Albany*, 9 *Paige*, 572; *Monroe v. Widner*, 11 *Id.*, 529; *Wait v. Van Alen*, 22 *N. Y.*, 319). And what it cannot do directly it has no power to do by indirection.

BY THE COURT.—McCUNN, J.—This is a motion for a new trial on the ground of newly discovered evidence. The controversy arose about a quantity of tobacco which defendant, on January 7, 1864, levied on as sheriff of the county. Plaintiff undertook to prove that some few days before the levy by the sheriff, the property had been transferred to him through the assignment of warehouse receipts. The testimony, although very much shaken by a severe cross-examination, was believed at the time by the jury, and they found a verdict for nearly five thousand dollars for plaintiff. Affidavits are now presented to us showing that newly discovered evidence exists, and that that evidence will show this suit to be a conspiracy on the part of the plaintiff and others and that their design was to use this court to enable them to carry out their fraud against the sheriff. I need not say that if such a con-

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spiracy exists or has existed on the part of the plaintiff as is shadowed forth in the affidavits, it is the duty of this court to intercept it at once.

The following principles are settled in regard to granting new trials on the ground of newly discovered evidence. The testimony upon which the motion is based, must have been discovered since the former trial. It must be such as could not have been obtained with reasonable care before. It must be material to the issue. It must go to the merits of the case, and not to impeach the character of former witnesses. It must not be cumulative—the facts must be strong, and the party offering them free from laches. The affidavits presented with the case here show that the facts contained therein were discovered since the trial. They show a conspiracy, to enable suit to be brought against the sheriff, and these facts were not discovered until a quarrel took place after the trial between the plaintiff and the party from whom he claimed title and the the witness on the trial. It (the testimony) could not have been obtained until some of the conspirators disclosed the facts, because it was their secret—known to them alone—and could not be reached by physical industry. It is material, because it (the new evidence) shows that the plaintiff never owned a dollar's worth of the property sued for, and it does not impeach any of the witnesses, because none of them swore to this conspiracy before. It (the evidence now offered and set up in the affidavits) is not cumulative, for the reason that no proof of any kind was offered by defendant, going to show this conspiracy. The defendant is free from laches, because he applied to the court the instant the conspiracy was discovered. In fact, the testimony now sought to be introduced is very material and not cumulative. It relates to a point upon which no testimony was given on the trial. It relates to the vital point in the case—"title in plaintiff." It is true that

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Raphaelsky says he bought the property on the fourth, but does not say that the bill of sale and warehouse receipt were signed and indorsed on the fourth. It was the indorsement of the warehouse receipt and the signing of the bill of sale which gave him the title ; and if these were not executed before the attachment by the sheriff, no matter whether dated back or not, his action fails. He says he bought the goods on the fourth. He then had reference, no doubt, to the date of the bill of sale, and the indorsement of the warehouse receipt, which were both ante-dated, and not to the actual time of the transaction. They (the receipt and bill of sale) were dated on the fourth, but the affidavits now presented clearly show that this was a false date, and that the bill of sale and the indorsement on the warehouse receipt, were gotten up after the sheriff's levy and that they were ante-dated so as to bring the date before the sheriff's levy under the attachment. The question as to the time when the bill of sale and indorsement of the warehouse receipt were actually signed, never came up on the trial. It was supposed at the time of trial, that they were executed on the fourth. It never entered the minds of any one that this was a conspiracy, and (about the dates of these instruments) that the papers were dated back. It now appears, by the wife of the person whose property the tobacco was, and from other reliable proof, that all the papers were a fraud. We must reasonably conclude that the jury, had they had before them the facts contained in these affidavits, disclosing the newly discovered evidence attached to the case in this cause, their verdict might have been affected by them, and they might have found for the defendant. These facts had not been disclosed at the time of the trial, but were discovered some time after ; and as soon as they were discovered, application was made at once. There is, therefore, no laches imputable in not giving them in evidence. If the sheriff's affidavits be true,

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he is placed here under great difficulties. When an officer of the law is under real disadvantage and is at a loss how to act, the court must endeavor to help him, as far as possible, away from the difficulties; at the same time, it must see that no wrong is done the other party. In regard to the law governing this case, and first as to the obsolete rules of 1799, denying new trials after the entry of judgment and without stay for that purpose. The court in many instances, in construing the rules of 1799, laid them down so rigidly that, in many cases, suitors found unreasonable difficulties in their way—difficulties and inconveniences worse than those which the rules were intended to correct. Indeed, these stern rules (1799) were so far disused and disregarded, and so little put in force down to 1832, that, in many cases, the rule was forgotten, and motions were often made, and granted, for new trials, after judgment, without even a knowledge of the rule being in existence (*Roosevelt v. Heirs of Fulton*, 7 *Cow.*, 107).

The sound maxim of policy is, that a greater evil should be avoided for a less, and a less good should give way to a greater. The rules of 1799 were harsh and oppressive, and the courts acting under them seldom or never enforced them during a period of thirty-three years. They skillfully or intentionally avoided them, and, after years of experience, finding the rule worked badly, in 1832, the legislature, at the solicitation of the courts, passed an act under which a new practice was inaugurated, and this statute allowed the granting of new trials after judgment, and even after execution was issued and money collected (*Laws of 1832*, ch. 12, § 1).

It must be borne in mind that no former act had fixed the rules and practice. The rules of 1799, these technical rules I speak of, were simply adopted by the court without the aid of the legislature, and these

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rules were always relaxed where good faith was shown by the parties. From 1832 until the adoption of the Code in 1848 and '49, an express statute (*Session Laws of 1832*, ch. 12) and the rules of the court passed in conformity therewith, authorized motions for new trials on newly discovered evidence after judgment. Such motions were constantly made at special term held every three months, and if judgment had been entered and collected, it was set aside and restitution ordered. Under the Code of 1848 and '49, a new system was being inaugurated. It was a mooted point whether new trials could be granted, the doubt being created by the provision of the Code of 1849 (§ 265), as to judgment becoming final after four days ; but even then it was held, that if a formal stay was merely granted within the four days, a motion might be made after judgment (*Droz v. Lakey*, 2 *Sandf.*, 680).

Under the Code, however, of 1851 and '52, the four-day provision contained in section 265 of the Code of 1848 and '49, and the provisions for a stay were dropped entirely ; and as the Code now stands, there is nothing prohibiting such motion, so that the Code is in harmony with the act of 1832, and with the rules and practice established thereunder. I say in harmony with the act of 1832, because section 389 of the Code of 1848 and section 469 of the present Code, provide that the then existing (present) rules and practice of the court that were consistent with that act "shall continue in force subject to the powers over the same of the respective courts as they now exist," and as this section of the Code is now in force, it must follow that the practice of allowing motions for new trials after judgment, and without a stay, established by the act of 1832 is in full force and effect, and applies to our present practice, and that the rules of 1799 do not apply. On the contrary, the rules of 1799 were wholly abrogated by virtue of the act of 1832 ; so that they do not

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now exist at all. Such was the practice laid down by Mr. Justice SLOSSON, of this court, in the case of *Benedict v. Caffee* (3 *Duer*, 699. That learned judge says: "The entry of judgment does not prejudice the motion for a new trial on the ground of the verdict being against evidence, &c., &c., &c. The terms of this rule (rule 8 of the superior court), plainly imply that such a motion may be made, notwithstanding the entry of judgment. *And we find nothing in the provisions of the Code inconsistent with it.*" This rule was also established in *Maloney v. Dows* (18 *How. Pr.*, 27), and in *Allego v. Duncan* (20 *Id.*, 210). It has been stated in the learned opinion below (on this motion), that the decisions in this court, since the Code, were uniform in not granting motions for a new trial, after judgment. My learned brother must be in error in this regard, because I find (as I have just cited) that Mr. Justice SLOSSON (3 *Duer*, 669), in a case immediately in point, holds that the entry of judgment does not prejudice a motion for a new trial. The case in 2 *Sandf.*, 680, in fact decides the question in the way I contend, but only in a more indirect form, because there a new trial was ordered, and that after judgment. The cases in 4 *Bosw.* 503, and 5 *Id.*, 73, and 7 *Id.*, 400, and 26 *How. Pr.*, 199, cited in the learned opinion below, against our views, were decisions made under the impression that the rules of 1799, in the absence of anything to the contrary in the Code, were in full force and effect; and the very learned judges in deciding those cases, unintentionally, no doubt, leaped over the decisions of sixteen years,—decisions made under the acts of 1832 and the rules framed thereunder,—which expressly gave the right to make these motions for leave, at any time, without a stay and without a motion for that purpose, and which act still stands in full force and effect. Nay more, as I have before stated, that act absolutely abrogated the rigid rules of 1799, so that it seems that

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the learned judges deciding the cases above mentioned, utterly ignored or had forgotten the laws of 1832.

Again, my learned brother, in deciding this motion below, I am afraid, fell into another error, in saying that only one case is to be found in the supreme court exhibiting a contrary doctrine to his views. With the very highest regard for that learned brother's research and attainments, I beg to be permitted to call attention to two cases in that court,—the cases of *Mersereau v. Pearsall*, 6 *How. Pr.*, 293; *Tucker v. White* 27 *Id.*, 97; and see note to same case in 28 *How. Pr.*, 78. In all of them are to be found learned opinions (opinions by the court), indicating and establishing a contrary doctrine. I find also, in the common pleas, *Maloney v. Dows* (18 *How. Pr.*, 27), a very able opinion of Chief Justice DALY. That learned judge shows conclusively that the practice under the act of 1832 is now in full force and effect. "The Code," Judge DALY says, "*has made no material change* (from the laws of 1832), *as to the course of procedure where the object is to obtain a new trial.*" But the four cases cited from the supreme court, in the learned opinion below, do not, in my opinion, show that this question has been decided in that court adversely to our views; because, in three cases out of the four the motions were actually heard and decided, and new trials granted on the merits, notwithstanding the dicta of some of the judges on this question of practice, and the other (15 *Johns.*, 353) was decided under the old rule of 1799, and before the laws of 1832 were passed. And in the case of *Gurney v. Smithson*, in the supreme court, the reasoning of the learned judge in that court and his decision were entirely based on false premises, having entirely overlooked the fact that the practice under the act of 1832 prevailed for sixteen years, immediately preceding the enactment of the Code.

We now come to the most important case yet cited—

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Folger v. Fitzhugh (41 N. Y., 228),—a decision which we now must follow implicitly. Notwithstanding the construction of our learned brother below to the contrary, Mr. Justice GROVER wrote the opinion, holding that a motion could be made for a new trial after judgment, and four other judges (MASON, MURRAY, DANIELS and HUNT) concurred, and Mr. Justice WOODRUFF held that the supreme court had inherent power and control over its own judgments, and certainly this view of Mr. Justice WOODRUFF amounted to the same thing ; it was, in fact, holding that the court could grant new trials after judgment. The other two learned Judges, JAMES and LOTT, dissented,—Mr. Justice JAMES writing a short opinion dissenting from the practice of granting new trials after judgment, Mr. Justice LOTT saying nothing on this subject,—so that we have six judges holding in that case that the courts below have the power to grant new trials after judgment, and that they have inherent control over their own judgments, and certainly the court can only have inherent control for the purpose of seeing manifest justice done, and correcting errors, and relieving suitors from oppression, wrongs, or mistakes, or misfortunes, where justice requires it, by granting relief in the way of new trials or otherwise, after judgment ; and while I must and shall at all times pay the utmost deference to the views of my brethren sitting below, yet I must repeat that the right to grant new trials after judgment, came up in the Folger v. Fitzhugh case, was fully and ably discussed, and that six of the judges held beyond a peradventure, that the court had a right to grant new trials after judgment ; and that only one of the judges (JAMES) dissented from that view, LOTT being silent on the question ; and the dissent of Justice JAMES was placed, as I learn, on mere technical grounds of practice. The learning displayed and the law laid down in this case (Folger v. Fitzhugh) by

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the court of last resort is the humane, sound and correct rule. It brushes away all technicalities, it settles the question and places the rights of injured suitors beyond the reach of technical and uncertain minds. The decision in that case (*Folger v. Fitzhugh*) has made this sound rule definite, certain and notorious, at the same time it avoids delay and saves large expense and time to the parties. All the decisions to the effect that a motion for a new trial cannot be made after judgment and without a stay are based upon the technicalities of the old practice of 1799, and are not in harmony with the spirit of modern jurisprudence. There is no reason in such a rule, and its enforcement would sometimes work great injustice, as the case at bar fully illustrates. The enforcement of such a rule would practically prevent the granting of new trials on the ground of newly discovered evidence. How can a defendant move for a new trial when he is ignorant of the facts which justify it or render it necessary? Newly discovered evidence, to be available for such a motion must, of necessity, have been discovered after trial, as in this case. Here the plaintiff based his right to recover on a bill of sale or on the indorsement or transfer of a warehouse receipt from Solomon, dated January 4, 1864, and he, plaintiff, and his witnesses, swore on the trial that the said bill of sale and receipts were executed on the day they bore date, January 4, 1864, and upon the sole strength of such swearing the plaintiff recovered. It is now clearly shown by proof to my mind reliable, that the witnesses perjured themselves, and that no sale took place until days after the sheriff had attached the tobacco—that the bill of sale and warehouse receipts were both ante-dated so as to make them read and take effect before the attachment and levy. Now in the name of justice would it be right to deprive the sheriff, a public officer, acting in the line of his duty, of an opportunity to show the truth of the statements

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contained in his affidavits. The order at special term should be reversed. We have not considered the order made by Mr. Justice SPENCER opening the case and allowing the motion for a new trial to be made. That order was disregarded by the learned judge below, on the hearing of this motion for a new trial. We think this was correct, because we can only believe that the motion to open the judgment and allow this motion to be made was done in accordance with obsolete technicalities unnecessary now to be resorted to, and we believe that the discussion of the original motion without the aid of Mr. Justice SPENCER's order for a new trial, both as to the facts and the law, was properly undertaken by the learned judge who decided the motion on its merits; but we hold that he committed error in denying the motion.

Chief Justice BARBOUR and Mr. Justice JONES concurred.

TUBBS *against* HALL.

Nem York Common Pleas; Special Term, September, 1871.

EXTRA ALLOWANCE ON DISCONTINUANCE.

Plaintiff may discontinue, although defendant has put in a counter-claim.

The court may compel the plaintiff to pay to the defendant an extra allowance in addition to the taxable costs, as a condition of discontinuing.

Such extra allowance was granted, in a case where defendant had retained counsel, and served an answer joining issue with the plaintiff's

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cause of action, and setting up a counter-claim, and where plaintiff, after having been required to do so, had failed to file a bond for costs.*

Motion for leave to discontinue.

This action was brought by George W. Tubbs against William F. Hall.

J. F. DALY, J.—Although the defendant has interposed a counter-claim, the plaintiff has the right to discontinue (*Oaksmith v. Sutherland*, 4 *Abb. Pr.*, 15; S. C., 1 *Hill.*, 261; *Pacific Mail Steamship Co. v. Leuling*, 7 *Abb. Pr. N. S.*, 37; *Seaboard & Roanoke R. R. Co. v. Ward*, 1 *Abb. Pr.*, 46; S. C., 18 *Barb.*, 595). The question remains, can the court, in a proper case, order the plaintiff to pay defendant an extra allowance under subdivision 2 of section 309 of the Code, in addition to defendant's taxable costs, as a condition of discontinuance. It rests in the discretion of the court to impose even the payment by plaintiff of defendant's taxable costs, as a condition of granting leave to discontinue (*Court of Appeals, Staiger v. Schultz*, 3 *Keyes*, 614; *De Barante v. Deyermant*, 41 *N. Y.*, 355; S. C., 40 *How. Pr.*, 180). It would seem, then, to be equally a matter resting in the discretion of the court, whether the plaintiff should be ordered, before discontinuing, to pay the whole or any part of the allowances authorized by sections 303 to 309 of the Code, inclusive, whether such allowances be what is commonly called "taxable costs," and provided for in section 307, or the sums mentioned in section 308, or the rates and percentages mentioned in section 309. The allowance under subdivision 2 of section 309 may be granted even where no trial has been had, where a defense only has been interposed; and this wording of the section seems to

* Compare *Leslie v. Leslie*, 10 *Abb. Pr. N. S.*, 64.

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have been intended to cover cases where the issues have not been brought to trial up to the time when the question of allowing costs is before the court. If the defendant be entitled to costs, he has the right to apply for an extra allowance under subdivision 2 of section 309.

The defendant is entitled to costs where the plaintiff discontinues, if the court thinks proper. In this case, the plaintiff tendered defendant his taxable costs, thus conceding his right to them, and I think the defendant was entitled to costs. The plaintiff was a non-resident, and commenced the action July 11, 1871. The defendant procured an order requiring plaintiff to file security for costs, which order has not been complied with. Defendant, notwithstanding, retained counsel and prepared and served an answer joining issue with plaintiff's cause of action, and setting up besides, a counter-claim.

The plaintiff should not expect to go out of court without making compensation to defendant for the expense this suit has caused him. The only way to indemnify defendant, is by granting a further allowance under subdivision 2 of section 309.

The defendant claims two hundred and fifty dollars, but this would be the limit the court could award (five per cent. on the claim of defendant in his answer), even after the expense of a trial. At this stage of the case, I deem one hundred and fifty dollars a proper allowance, upon the grounds disclosed by the affidavit of defendant's attorney on this motion.

The plaintiff may have an order of discontinuance, on payment of that sum, with the taxable costs and disbursements.

Order accordingly.

Hadley v. Ayres.

HADLEY *against* AYRES.*New York Common Pleas; General Term, April, 1870.*ATTORNEY'S COMPENSATION.—INTEREST ON CHARGES
FOR SERVICES.

On a mutual, running, unliquidated account between attorney and client, the attorney is not entitled to interest on charges for services, not liquidated by the fee bill, nor by agreement, and the amount of which was only ascertained on conflicting evidence at the trial, and for which no time of payment was fixed.*

He may be allowed interest on disbursements.

Appeal from a judgment entered on the report of a referee.

This action was brought by Amos K. Hadley, plaintiff, against Eleazer Ayres, defendant, to recover the sum of two thousand nine hundred dollars, which the former alleged that the latter owed him over and above all payments and counter-claims, for professional services rendered as an attorney and counselor at law, in prosecuting and defending divers suits in the courts of this State, and drawing sundry contracts and agreements, between January 1, 1857, and June 27, 1867.

The defendant admitted that he employed the plaintiff, but claimed that the latter was only entitled to the taxable costs and his disbursements, for his services.

He also set up a counter-claim, amounting, in the

* In *Mygatt v. Wilcox* (45 N. Y., 306; affirming 1 *Lans.*, 55), where interest was allowed on the charges for services from the time the bill was rendered, after termination of the services, the reasonableness of the charges was not questioned.

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aggregate, to one thousand five hundred and sixty-seven dollars, for rent of office, moneys collected by plaintiff from other persons on his behalf, goods sold and delivered, and work, labor and services rendered.

The referee found in favor of the plaintiff, for the sum of two thousand seven hundred and seventeen dollars and seventy-one cents, besides interest thereon from June 27, 1867, to the date of this report, which interest amounted to the sum of three hundred and eighty-eight dollars and thirty-nine cents.

Judgment was accordingly entered in favor of the plaintiff against the defendant, for three thousand seven hundred and sixty-two dollars and twenty-eight cents, damages and costs.

The defendant appealed to the general term.

L. S. Chatfield, for defendant and appellant.

A. K. Hadley, plaintiff and respondent, in person.

BY THE COURT.—LOEW, J.—As the plaintiff in this action denies that he ever made the agreement, testified to by defendant,—that he would charge only the taxable costs for his services,—and as the referee found in his favor on that point, it became immaterial whether all the charges on the bill of particulars were strictly taxable or not.

Under the Code, an attorney, in the absence of an express agreement as to his compensation, is entitled to what his services are reasonably worth (*Garr v. Mair*, 1 *Hilt.*, 498; *Stow v. Hamlin*, 11 *How. Pr.*, 452).

The plaintiff testified that he never made any agreement with defendant other than that he should charge him as lightly as he could.

On the trial, the charges in the bill of particulars appears to have been referred to and used, simply as a basis or criterion, for the purpose of assisting in ascer

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taining what would be a fair and reasonable compensation (in addition to the counsel fee charged) for the services rendered by the plaintiff in the several causes and matters specified in the bill of particulars.

No error appears to have been committed by the referee in his ruling, in respect to that question, except, perhaps, as to the suit of *Waring v. Ayres*.

With regard to the latter suit, I think the referee erred in allowing the plaintiff more than taxable costs, as he himself admitted when he was recalled, that that was an exceptional case, in which he advised a settlement, and told the defendant that he would take the taxable costs for his services therein.

I am also of the opinion, that the referee erred in the allowance of interest.

The general rule is well settled, that on an unliquidated account for goods sold, or work, labor and services rendered, no interest can be recovered, unless there is an agreement, express or implied, to that effect, or a time of payment has been fixed (*Holmes v. Rankin*, 17 *Barb.*, 454; *Adams v. Fort Plain Bank*, 23 *How. Pr.*, 45; *Reid v. Rensselaer Glass Factory*, 3 *Cow.*, 393; 5 *Id.*, 587; *Wood v. Hickok*, 2 *Wend.*, 501).

I am aware that the court of last resort reversed the judgment in *Adams v. Fort Plain Bank* (*supra*), for the reason that interest should have been allowed (36 *N. Y.*, 255).

But the decision was put on the ground that the referee had found as a fact that the indebtedness existed in a fixed amount, and accrued on certain specified days, long before the action was brought; and the court held that the finding of the referee was conclusive, and that they would not inquire how the indebtedness arose.

Now, in the case under consideration, there was no such finding by the referee.

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Here the account was mutual, running and unliquidated, and open to inquiry before the referee.

The evidence was conflicting as to what plaintiff's compensation was to be, and it could not, therefore, be known what amount he was entitled to, till found and reported by the referee ; nor does it appear that any specified time for payment had been agreed on by the parties.

As interest can only be computed on the amount when ascertained, it should not have been allowed on any thing, except the disbursements paid by the plaintiff ; and as to those advances, I am inclined to think he was entitled to interest from the time when they were respectively made (*Reid v. Rensselaer Glass Factory, supra*).

The judgment should, therefore, be reversed, and a new trial granted, unless the plaintiff should elect to reduce the amount of the judgment in accordance with the preceding views, in which case, the judgment should be affirmed, without costs of appeal.*

CHAS. P. DALY, Ch. J., and VAN BRUNT, J., concurred.

* After the delivery of the above opinion, the plaintiff stipulated to reduce the judgment, in accordance with the decision of the court, by deducting therefrom the sum of three hundred and eighty-eight dollars and thirty-nine cents, interest, which had been included therein ; and the further sum of two hundred and eighty dollars, counsel fees in the case of *Waring v. Ayres*,—in all, six hundred and sixty-eight dollars and thirty-nine cents.

Subsequently, the defendant appealed to the court of appeals, where, in November, 1871 the judgment was in all things affirmed.

Hadley v. Fowler.

HADLEY *against* FOWLER.*New York Common Pleas ; Special Term, April, 1872.*

EXAMINATION OF PARTY BEFORE ISSUE.

Under section 391 of the Code of Procedure, and Rule 21 of 1871, a party to an action may, in a proper case, have an order for the examination of his adversary before issue joined.*

The case of *McVickar v. Greenleaf* (1 *Abb. Pr. N. S.*, 452; *S. C.*, 7 *Robt.*, 657), approved; and *Bell v. Richmond* (4 *Abb. Pr. N. S.*, 44; *S. C.*, 50 *Barb.*, 571), overruled.

Motion to vacate an order for the examination of the plaintiff, granted at the instance of the defendants, before issue joined.

This action was brought by Amos K. Hadley, plaintiff, against Jonathan O. Fowler and John A. Dongan, defendants, as sureties, to recover from them a balance alleged to be due him on a certain judgment recovered by him in this court against one Ayres, the defendants herein having executed the undertaking given by said Ayres on an appeal taken by him to the court of appeals, where the judgment of this court was affirmed.

After the summons and complaint in this action had been served, the defendants, upon affidavits, obtained an order for the examination of the plaintiff before trial, which the latter now moved to vacate and set aside, on the ground that the same could not be granted before issue joined.

A. K. Hadley, plaintiff in person, for the motion.

Wilcox & Ludden, opposed.

* To the same effect is *Havemeyer v. Ingersoll*, p. 276 of this vol.

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LOEW, J.—It was held by the general term of the superior court, in the case of *McVickar v. Greenleaf* (1 *Abb. Pr. N. S.*, 452 ; *S. C.*, 4 *Robt.*, 657), that a party to an action could be examined at the instance of the adverse party, under section 391 of the Code, immediately on the commencement of the action, and before issue joined.

That decision was subsequently followed at the special term of that court in two other reported cases (*Fullerton v. Gaylord*, 7 *Robt.*, 559 ; *Duffy v. Lynch*, 36 *How. Pr.*, 509).

A different view was, however, taken in *Bell v. Richmond* (7 *Abb. Pr. N. S.*, 452 ; *S. C.*, 50 *Barb.*, 571), where it was held by the general term of the supreme court, in this district, that such examination could not be had until after issue joined.

So far as I am aware, this court has never passed on the question, but I have conferred with my colleagues and they all, with a single exception, agree with me that if the case be a proper one, the examination contemplated by the section referred to may be had as well before as after the joining of issue. And I really do not see why such should not be the case.

The examination allowed by the Code, and which is to be had on a summary application to the court, is a substitute for the bill of discovery under the former practice (*Code*, § 389), and the settled rules in relation to those bills may, I think, with propriety, be regarded as controlling with respect to the examination under the Code, when they do not conflict with the letter or reason of that act.

Now a bill of discovery could be maintained in the court of chancery not only before issue was joined, but even before the suit was commenced (2 *Barb. Ch. Pr.*, 105, 106).

There does not, therefore, appear to be any good reason why the examination authorized by the Code

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should not be permitted till after issue joined, when the language used in section 391 is, that it "*may be had at any time before the trial*;" and when, if the legislature had intended to restrict it to cases in which issue has been joined, they could and, doubtless, would have so declared, in express terms.

A similar view appears to have been taken by the judges of the several courts of record in convention assembled, for they, in December, 1870, with the conflicting decisions of the supreme and superior courts before them, adopted a new rule (rule 21), which recognizes the right to have such examination, for the purpose of framing a complaint or answer, and prescribes the requisites of the affidavit upon which the application for the order shall be made.

In adopting this rule, the convention, doubtless, had a two-fold object in view : 1. To confine the examination to those cases in which it shall appear to the court that the party is entitled to the discovery he seeks, or in other words, that the same is requisite or material, and should be had in order to enable him to frame his complaint or answer, or establish his case or defense on the trial ; and, 2. To aid the court in restricting the examination within proper limits, in such cases.

As the affidavits upon which the order was based, which is now sought to be vacated, disclosed a case in which, in my opinion, it is material that the defendants should be allowed to examine the plaintiff before they are required to answer the complaint, the motion must be denied, with costs.

Order accordingly.

Penfield v. James.

PENFIELD *against* JAMES.

*Supreme Court, First Department, First District;
Special Term, April, 1871.*

OFFER OF JUDGMENT.—POSTPONEMENT OF FORE-
CLOSURE SALE.—COSTS.

It seems, that where, in a foreclosure suit, there being several defendants, those only have answered against whom a personal claim is made, and they offer to allow judgment to be taken against them for a certain sum *and costs*, the plaintiff may enter judgment against them for such sum, with costs for the proceedings against all the defendants.

Where the general term modify the judgment rendered, and reduce the plaintiff's recovery to the amount of an offer of judgment made by the defendant before verdict, and give leave to either party to apply for a re-adjustment of costs, the plaintiff cannot proceed to enforce the judgment, until the application has been made and determined.

Motion for a stay of proceedings.

Thomas D. Penfield brought this action against Edward D. James, Sarah James and others, for the foreclosure of a mortgage of five thousand dollars on property in the city of New York. Pending the trial, and before verdict, the two defendants, James, who were the only parties against whom a personal claim had been made, and were the only parties who had answered, offered to allow judgment against them for a certain sum, with interest and costs. Seven other defendants had not answered, and as to them, a reference was pending to compute the amount due on the bond and mortgage. Defendants' offer was refused, and plaintiff recovered a more favorable judgment, and

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taxed costs accordingly. On appeal, the general term reduced the recovery to the amount of plaintiff's offer, with leave to either party to apply for a re-adjustment of costs. Defendants now move that the foreclosure sale under the judgment be postponed, till such application be made.

Edward D. James, for the motion.

Cyrus Lawton, opposed.

BRADY, J.—The plaintiff did not demand a personal judgment against any of the defendants other than Sarah James and her husband, Edward D. James. They were the debtors. The other defendants were necessary parties, having, it was supposed, some interest in or lien upon the premises mortgaged. The defendants, James, offered to allow judgment to be taken against them for a sum named and interest thereon, with costs. Under that offer, the plaintiff would have been entitled to judgment for the amount of the offer, which would include the interest, and the taxable costs—that is, the costs allowed for the proceedings against them and the other defendants who were made parties to the action, and an allowance. The offer did not restrict the plaintiff to costs for proceedings against them. It is for judgment with costs—and that, as already suggested, must be construed to mean all the costs to which the plaintiff would be entitled on obtaining and entering the judgment for which he prayed, and to recover which the action was commenced. None of the other defendants appear to have answered. The plaintiff recovered a more favorable judgment than the offer gave him; but on appeal, the general term reduced the recovery to the amount of the offer, and the judgment was not then more favorable. The costs adjusted against the defendants,

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James, and against them only, were as if no offer had been made, and the general term, by order, gave the liberty to either party to apply for a re-adjustment of them. The modification of the judgment as stated, and the order for the re-adjustment of costs, left the amount which the plaintiff was entitled to collect on the judgment as entered, at least so far as he was concerned, in doubt, and rendered it necessary that application should be made to determine whether, under the circumstances, the costs as originally adjusted, should remain. Until that was done, I think the plaintiff could not proceed to sell the mortgaged premises, and the defendants, James, could not, if they had so intended, appeal, because there was no judgment in conformity to the decision of the general term. The plaintiff did not obtain a more favorable judgment, and the defendants were entitled (*Code*, § 385) to the costs allowed by statute, which accrued subsequent to the offer, by reason of their answer and defense; and their taxation would reduce the amount of the plaintiff's recovery.

For these reasons, I think the sale should be postponed, in order to have the costs adjusted. The right of the plaintiff to an allowance, I regard as settled by the order of the general term.

Godfrey v. Williamsburgh City Fire Ins. Co.

GODFREY *against* THE WILLIAMSBURGH CITY
FIRE INSURANCE COMPANY.

New York Superior Court; Special Term, February,
1872.

COMPULSORY REFERENCE.

A compulsory reference should not be ordered where the cause can be tried in a reasonable time by the court, since the additional time and expense necessary in a trial before a referee, may, in some cases, amount to a denial of justice.

The power to order a reference in a case where no fraud was involved, and a mere ascertainment of damages was required, existed before the Constitution of 1846, and was not taken away by that instrument.

The case of *Townsend v. Hendricks* (40 *How. Pr.*, 143) criticised and distinguished.

Motion for a reference.

The action was by John Godfrey, upon a policy of insurance for a loss by fire. The answer put in issue merely the value of the property destroyed or injured. Three other similar cases came before the court at the same time on the same motion.

G. W. Parsons, for the motion.

J. E. Parsons, opposed,—insisted: 1. That under the case of *Townsend v. Hendricks*, lately decided by the court of appeals, the court cannot make a compulsory reference in cases of this nature. 2. That a reference would be onerous.

MONELL, J.—An examination of the case of *Townsend v. Hendricks* (40 *How. Pr.*, 143), has satisfied me

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that the several cases in this court and in the supreme court, sustaining the power of the court to make compulsory references in actions on insurance policies, have not been disturbed. The extent to which that case goes, is, that the right of trial by jury is absolute, in actions for *torts*; leaving untouched the principle established by the cases referred to, that where no question of fraud is involved, and a mere ascertainment of damages is required, the court may refer.

This power to refer was exercised as far back as 1829 (*Samble v. Mechanics' Fire Ins. Co.*, 1 *Hall*, 560), and was frequently reasserted, in this court and in the supreme court, previous to the adoption of the Constitution of 1846; and it may fairly be presumed that the framers of that instrument, when they preserved in the bill of rights, the trial by jury in cases in which it had been *theretofore* used, were fully apprized of the power which had previously been exercised by the court in this class of cases.

I have no doubt, therefore, that the court may still refer those cases, whenever it appears that the only question involved is the value of the property injured or destroyed.

But I do not think it is proper to refer this case.

A reference in any case is not a matter of right. Its primary object was to relieve the court of the tedious examination and investigation of long accounts; and formerly it was resorted to only in such cases. Its scope has been somewhat enlarged in later days, and the office of referee is now raised to the dignity of a court, with very nearly the same powers as a court. But the sole question is not always, whether or not the action is referable. There are other considerations which should have their weight in determining the matter; and if it can be seen that it may work a wrong, or a hardship, or be oppressive upon one or the other of the parties, the court should not inflict such wrong or hard-

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ship, merely because its convenience or time may be disturbed.

I am satisfied this action can be tried *in court* during the sitting of about one day, and that each of the other three actions, can also be tried within a like time; while a trial before a referee, from various causes, all proper in themselves, would occupy a much longer space of time. The expense, also, is very different. Besides the referee's fees, which are no inconsiderable item, the counsel fees in trials before referees are necessarily, from the additional time required, and very properly, much greater, than in trials before a court and jury; and it is not difficult to conceive a case where these additional burdens would or might be, almost a denial of justice.

The motion in this and the three other cases is denied.

VINCENT *against* BAMFORD.

New York Superior Court; General Term, May, 1871.

ACTION AGAINST STOCKHOLDER.—WHO IS "SERVANT" WITHIN MANUFACTURING COMPANIES' ACT.

The word "servant," as used in section 18 of the Manufacturing Companies act (*Laws of 1848, 54, ch. 40, § 18*), is not restricted to one who performs menial service, but includes one acting as engineer and foreman, and sometimes as superintendent, in a mining company.

The case of *Hovey v. Ten Broeck* (3 *Robt.*, 316) on this point, approved and followed, and held not to be overruled by *Coffin v. Reynolds* (37 *N. Y.*, 642), which applies only to *officers* of companies, a class of agents specifically mentioned in other sections of the statute.

Vincent v. Bamford.

Appeal from a judgment.

Victor Vincent brought an action against Charles Bamford, in the New York superior court, to charge the defendant as a stockholder in the New York & Galena Lead Mining Co., for a debt due to the plaintiff from the company, for which he had recovered a judgment, execution on which had been returned unsatisfied. The defendant was sought to be made liable therefor as a stockholder of the company, under section 18 of the manufacturing companies act of 1848. The material facts appear in the opinion. Plaintiff had a verdict, on which judgment was entered; and a motion was made by defendant on the judge's minutes, to set aside the verdict as against evidence. This motion was denied. From the order denying the motion, and from the judgment, defendant appealed to the general term.

Erastus Cooke, for defendant, appellant.

Frederick R. Coudert, for plaintiff, respondent.

BY THE COURT.*—FREEDMAN, J. [After discussing certain exceptions to the admission of evidence which he held to be not well taken.]—This brings up the main question of law involved in the case, which is presented chiefly by the exceptions of the defendant taken to the refusal of the court to charge certain requests, namely, whether plaintiff, in the performance of the services rendered, was or was not a servant within the true intent and meaning of section 18 of the statute referred to, which provides that the stockholders of any company organized under the provisions of said act, "shall be jointly and severally individually liable for all debts that may be due and owing to all their laborers, servants and apprentices for services performed for such

* Present, BARBOUR, Ch. J., and FREEDMAN and SPENCER, JJ.

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corporation." The cases cited by defendant in opposition to plaintiff's claim upon this point, did not arise under the same, but under other and different statutes, for the passage of which, entirely different reasons may have existed. They have all been considered, and held inapplicable to a case of this kind, in *Hovey v. Ten Broeck* (3 *Robt.*, 316), where it was decided by this court that the word "servant," as used in the statute under consideration, cannot be confined to mere menial service. According to the testimony, plaintiff was employed to do, and did do everything he was told to do. He was a sort of engineer, a sort of foreman; he showed the men how to work, and yet worked with them; during the absence of the superintendent from the mines, he was made to act as such; he sometimes kept the time of the men, and in fact did everything he was ordered to do, and everything that was necessary and possible for him to do. He is, therefore, clearly entitled to the application of the rule laid down in *Hovey v. Ten Broeck* (*supra*), unless, as it is claimed, that case has been reversed as an authority, upon the point stated, by the decision of the court of appeals in *Coffin v. Reynolds* (37 *N. Y.*, 642). Upon examination, it will be found, however, that such is not the fact. The latter case simply decides that the secretary of a company organized under the act of 1848, being an *officer* thereof, and belonging, as such, to a class of agents specifically mentioned in other sections of the statute, does not come within the designation of a laborer or servant, as used in section 18. This distinction is a marked and material one, and not in conflict, but in harmony with the views expressed by this court in *Hovey v. Ten Broeck* (*supra*). *Williamson v. Wadsworth* (49 *Barb.*, 294), is another express authority under the statute in question, in plaintiff's favor.

The judgment and order appealed from must be severally affirmed, with costs.

Reade v. Waterhouse.

READE *against* WATERHOUSE.

*New York Superior Court; Special Term, April,
1872.*

LIABILITY OF ASSIGNEE IN BANKRUPTCY FOR COSTS.

An assignee in bankruptcy, who prosecutes unsuccessfully an action which had been brought by the bankrupt in a court of this State, and which was pending when the cause of action was transferred to the assignee, is liable personally for costs, under section 321 of the Code of Procedure.

Motion for an attachment.

This was a motion by defendants, to make plaintiff's assignee in bankruptcy liable, under 321 of the Code, for costs recovered by defendants. After the action had been at issue a year, the plaintiffs became bankrupt, and an assignee was duly chosen, who pressed the suit to trial. The defendants were successful upon the trial, and entered judgment for seven hundred and ninety-four dollars and ninety-eight cents, costs; and then moved for an order that the assignee be made liable for the costs, and for an attachment against him, on his failure to pay them.

John E. Parsons, for the motion.

Albert Smith, opposed.

SEDGWICK, J.—The case of *Columbian Ins. Co. v. Stevens* (37 *N. Y.*, 536), determines that a receiver of an insolvent insurance company, appointed by the supreme court, is a person liable for costs, under the provisions

*Affirmed
35 Superior 70
Reversed 52 N.Y. 58*

Reade v. Waterhouse.

of section 321, in an action in which the cause of action becomes his property, after the commencement of the action, in the same manner as if he were a party. The assignee in bankruptcy here, becomes the owner of the cause of action, in the same way, and becomes liable under that section, unless there is some provision of the bankrupt act which prevents the application of the Code in this respect. This, however, is not claimed by the counsel for the assignee. Where a party submits himself to the jurisdiction of a court, he submits himself to all orders of the court made in the exercise of that jurisdiction.

It must then be ascertained what would be the liability for costs of the assignee, if he were a party to this action. Judge WOODRUFF, in the case cited, was of opinion (p. 538) that the right of the defendant in that action to indemnity against groundless prosecution, was clear, under section 321, and that it was not necessary to invoke section 317 of the Code for its maintenance, further than to say that its provisions warranted the charge of those costs upon the funds in the hands of the receiver. In other words, the liability of the receiver was perfect under section 321 ; and as, under section 317, the costs might be charged upon a fund, the supreme court were not obliged to enforce payment by attachment, but should have made a direct order that the receiver, an officer of the court, should make payment out of the fund in his hands, and which was under the control of the court. It may, then, be proper, within the spirit and meaning of that case, to look to section 317, to find if, under that section, the assignee in bankruptcy here, if he had been a party to the action, would have been relieved from liability to pay costs.

Section 317 regulates costs in actions in which executors, administrators, trustees of an express trust, and persons authorized by statute to sue, are parties.

Yet while an assignee in bankruptcy is a trustee of an express trust, he is not of the kind meant by the statute.

The statute evidently means trustees of that kind that have, or from the nature of their trust, may have a fund, on which the court can charge the costs, or who represent a party, from whom the court can direct costs to be collected. But an assignee in bankruptcy represents no party, in the sense of the Code, and the court cannot make any charge upon the fund held by such assignee. Such fund, by law, is to be solely administered under the direction of the district court in bankruptcy. The only other class named by the section, which might include assignees in bankruptcy, is of persons expressly authorized by statute to sue. It may be that this means statutes of the United States and of this State, but it does not refer to an assignee in bankruptcy, for the same reason given when considering trustees of an express trust. In other words, such trustees and such persons specified in the section, are those from whom the court have it in their power to exact justice, by making a fund held by them chargeable. This excludes trustees, the fund in whose hands, by the nature of their trust, cannot be charged by the court.

This construction is supported by a deduction from *Cummings v. Egerton* (9 *Bosw.*, 684), which holds that it is bad faith for a trustee to bring an action when he has no fund in his hands, out of which to pay costs. The deduction referred to, is that the statute intended that a successful party should have indemnity from a trustee personally, or from a trust fund held by him.

Cummings v. Egerton also would require, that if section 317 covered the case of an assignee in bankruptcy, that an order should be made that he personally pay costs, because, so far as the purpose of the

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section is concerned, he can have no fund in his hands.

The conclusion seems inevitable, that this motion must be decided by the provisions of section 321, and that the assignee must be directed to pay the costs.

This result is reached in view of the bankruptcy act. Section 14 of that is not imperative, and it is not, by it, the absolute duty of the assignee to prosecute pending suits. "He may prosecute." This is permission. Such a word is imperative, when the exercise of the power referred to is beneficial to the public, as third parties. Then it becomes a duty to exercise the power, and the law is intended to require, imperatively, the performance of a duty. But under the bankruptcy act, it only becomes a duty for an assignee to prosecute a suit when the interest of his estate demands it, of which the assignee is, in the first instance, the judge.

Section 16 of the act is to the same effect. By section 28 of the same act, if at any time there shall not be in the hands of the assignee a sufficient amount of money to defray the necessary expenses required by the further execution of his trust, "he shall not be obliged to proceed therein, until the necessary funds are advanced or satisfactorily secured to him." The assignee, then, is not to proceed, until he sees that it is for the benefit of the estate that he should, and he need not, unless he has money in hand sufficient to meet the expenses of the prosecution, or until he has received satisfactory security for those expenses. The district court will fully protect all his claims upon the fund. Plainly, therefore, it would not be right that he should not be liable in costs to a party whom he unsuccessfully prosecutes. Of course, as was said by Judge WOODRUFF, in the case first cited, the fact that the assignee was unsuccessful, is not proof that the proceeding was not taken for the benefit of the estate.

No doubt the district court will give the proper di-

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rection in the matter. The considerations last advanced, further show that section 317 of the Code was not meant to apply to a case of the kind now to be decided.

The motion is granted, but without costs as the matter is decided under a recent law.

MULLIGAN *against* ELIAS.

Brooklyn City Court ; Special Term, March, 1872.

INJUNCTION.—NUISANCE.

A court of equity will restrain by injunction, the carrying on of a factory in such manner as to emit a sulphurous gas which is occasionally borne by the winds over the neighboring premises of the plaintiff, destroying vegetation, and compelling the closing of windows, and irritating and inflaming the throats of those who breathe it.

It is not necessary, in order to obtain an injunction and damages, to show that the fumes are prejudicial to health, nor is it an answer to the complaint, for defendant to show that they tend to neutralize a malaria existing in the locality. ¹

The fact that the place is a manufacturing place, does not justify an extraordinary use of property, introducing a serious annoyance, in addition to those arising from the ordinary uses of property there.

Relief against such a nuisance will not be denied on the ground that it existed before plaintiff acquired his property or built his house, at least, unless continuance long enough to establish a prescriptive right, be shown.

Trial by the court.

This action was brought by John Mulligan against

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Jacob Elias, to have the chemical works of the defendant, as carried on by him, in Williamsburgh, declared a nuisance and enjoined, and to recover incidental damages. The facts sufficiently appear in the opinion of the court.

Dailey & Perry, for plaintiff.

Edgar M. Cullen and *Winchester Britton*, for defendant.

NEILSON, J.—The questions involved in this action are: *First*, whether a nuisance has been created by the escape of gas from the defendant's chemical works; and if so, *Secondly*, whether the plaintiff has suffered damages as claimed.

The defendant manufactures sulphuric acid after the usual method. The plaintiff's property is situated nearly two hundred feet southwest of the factory.

It is claimed that the sulphurous gas, not subjected to condensation in manufacturing the acid, escapes and is carried over upon the plaintiff's premises and into his dwelling, to the annoyance and injury of himself and his family, and the destruction of the trees, vines and plants in his garden.

The testimony taken on the trial is voluminous,—the parties, men employed in the factory, persons residing in or visiting the neighborhood, chemists, physicians, and some manufacturers, having been examined as witnesses.

The case is important to the plaintiff, if his complaints are well grounded; to the defendant, who must have made a large investment in the works sought to be enjoined.

The proof as to the presence of sulphurous gas in the interior of the defendant's factory, is full and conclusive. The sulphur burned in the ovens is frequently

supplied. When the doors of the ovens are opened for that purpose some of the fumes escape. The lead condensing chambers into which the fumes are carried from the ovens, and in which the process of oxidation goes on, though intended to be perfectly tight, are not always so. A witness, one of the chemists, says, that on entering the factory, he inhaled sulphurous gas; that he found the irritating effect the greatest in the furnace room; except from minute leaks in the lead chambers, where, if a hole were no larger than a pin's head, he could hardly pass,—found it unbearable; but that in an hour it would clear up and be quite free from gas. No reason has been given for that fluctuation, nor would a mere opinion on that point be of much moment, the vital fact being that the escaping fumes were found in the interior of the building. It was proved that those fumes would pass through the ventilators,—slat work in the roof.

We are thus prepared to find sulphurous gas on the outside of the factory, and to consider its action and effect.

It goes with the wind, of course. When the gas is blown over on the plaintiff's place its presence is perceived, in damp and foggy weather more decidedly than when the atmosphere is dry and clear. Inhaled, it irritates the throat and air passages, excites a cough, a suffocating sensation. It inflames the mucous membrane of the eyes, causes them to smart and run water. There were occasions when the gardener could not continue his work exposed to the infected current of air, when, in the extreme heat, the inmates of the dwelling closed the windows as a protection; of two evils—distress and discomfort—choosing the least. It has also occurred that the physician, on his visit, thought it necessary to put down the windows on account of the gas. One of the defendant's witnesses, living in a different direction from the works, says: "When the

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wind is from the factory I try to get out of the way, it sets me coughing." Thus, in a circle round the factory, except on the side next Newtown Creek, where there are no dwellings, the gas is felt according to the prevailing winds.

This sulphurous gas bleaches vegetation, and, destroying one crop of leaves after another, finally destroys the tree or vine itself. The plaintiff has thus lost vines and shrubbery. In parts of the neighborhood, and, indeed, of the same garden, vegetation and fruits have done well, but that was so to the extent to which such parts were protected by the walls and buildings. The plaintiff's garden lies fully exposed, and further on, in the same track, the florist has lost grapes, plants and flowers on the part of his grounds which was thus exposed.

This gas affects paint, deposits a sulphuret of lead, darkens the color, and renders it less durable.

The evils which the simple people, living in the neighborhood and called as witnesses, ascribe to the gas flowing from the defendant's works, are the very same evils which, according to the testimony of the experts, would be thus caused. The experience of the persons who have thus suffered qualifies them to speak as witnesses. They knew from actual observation that the disturbing element only came to them in renewed strength when the wind blew from the factory; knew that their hours of security and repose were when the wind moved in other directions.

Several witnesses were called on behalf of the defendant, as to the principal points in contention. In a large degree, however, the contradictions were more seeming and formal than real and substantial. Some of the witnesses, often in the neighborhood, felt little or no disturbance. One chemist, who visited the factory twice, first in 1869, on behalf of the Board of Health, and again in 1870, at the instance of the de-

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fendant, is confident that no gas is evolved from the factory, felt no sense of its presence. The explanations would seem to be that on the occasions when he was there, and when other visitors of like experience were there, the condition of the atmosphere was favorable, and the wind was carrying the gas in other directions. As to the defendant himself and his employees, it may be said that they have become used to the gas,—in a sense, acclimated. By a beneficent law of nature, persons may become so enured to offensive employments as to lose all sense of their being unpleasant. It is matter of professional and judicial experience that in cases of this class, witnesses come from the gas works, the slaughter house and the bone boiling establishments, to prove that there was nothing in them disagreeable or unhealthy.

It was quite apparent that most, if not all, the witnesses called from this factory and its vicinity were in good health. That fact would be more material if I were at liberty to treat this subject as it would be treated on an inquiry under municipal or mere sanitary regulations. On such an inquisition, the fact that the emanation in question was or was not injurious to the health would be determinate. But in an action like this, it is not necessary, as a condition to relief, that the objectionable agent should be prejudicial to the health of the complainant. It is sufficient, if this gas, escaping from the defendant's factory, is oppressive to the senses, renders the plaintiff's dwelling uncomfortable, and sensibly and materially lessens the enjoyment of his property. Though the defendant's business is *per se* lawful, yet, being so conducted as to injure an adjoining proprietor, a nuisance has thus been created.

The principle which underlies the question is, that a man is bound to so use his own property as not to injure his neighbor. But for such wholesome limita

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tion, the policy of the law as to the acquisition and domestic enjoyment of property might often be defeated. Hence it is, that in a great variety of cases the courts have interfered to restrain or punish the proprietor of the business creating the nuisance, as, for example, when the injury was caused by disagreeable vapors and odors (9 *Paige*, 575 ; 3 *Barb.*, 175 ; 3 *Sandf.*, 126 ; 52 *Mass.* [11 *Metc.*], 570 ; 4 *Best & S.*, 608) ; by mere smoke (3 *Eq. Cases, Law Rep.*, 409 ; 4 *C. E. Green* [*N. J.*], 294) ; or by disturbing noises (4 *Den.*, 311 ; 2 *Simons N. S.*, 133 ; 33 *Conn.*, 118 ; 5 *Barb.*, 79).

The real question in all the cases was, whether the annoyance substantially interfered with the comforts of human existence and the enjoyment of property.

Some special views suggested on the argument remain to be noticed.

It is supposed that this business has been carried on in a fit, proper and convenient place, as this is a manufacturing district. The words *convenient* and *proper*, as applied to the location and surroundings of an objectionable business, were considered in several English cases (*Cavey v. Ledbitter*, 13 *Com. Bench Rep. N. S.*, 470 ; *S. C.*, 106 *E. C. L.*, 470 ; *Bamford v. Turnley*, 3 *B. & S.*, 62 ; *S. C.*, 113 *E. C. L.*, 65 ; *St. Helen's Smelting Co. v. Tipping*, 11 *H. L. Cas.*, 642 ; *Crump v. Lambert*, 3 *Eq. Cas. Law Rep.*, 409) ; and in New Jersey, by Chancellor ZABRISKIE, in *Ross v. Butler* (19 *N. J. Eq.*, 294). The occasion for such discussions was furnished by the attempt which had been made, on the trial of *Hole v. Barlow*, to create a qualification of the general rule by the application of those words. But that case having been overruled, the conclusion is, so far as the general rule can be stated, that the place from which the nuisance proceeds, will not be deemed fit, convenient or reasonable, if the adjacent residents suffer undue annoyance. The cases, above cited, also meet and dispose of the notion that the fact that the

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district or town has factories as well as dwellings, or has the former somewhat in excess of the latter, is an answer to the just complaints of one who in his person, family and property suffers from a nuisance caused by the manufacturing business. Even where the smoke and noise, arising from the factories, some of which had existed for more than twenty years, had prevailed, causing serious annoyance to the inhabitants, relief was granted against the party whose works introduced a new element, a material addition to what was bad enough before (*Crump v. Lambert, supra*). On the same principle, it is everywhere confessed that one chargeable with polluting the waters of a creek by discharging in it refuse matter from his works, could not assign as an excuse, that the waters, as they came down to him, were already materially impure.

But in determining whether the thing objected to as offensive is a nuisance, regard must be had to the character of the neighborhood and of the business carried on therein (83 *Mass.* [1 *Allen*], 137; 95 *Id.* [13 *Allen*], 95). What may be a nuisance in one locality may not be so in another; what should be patiently endured by an inhabitant of a place like Pittsburgh, where smoke, dust and noise have a general supremacy, could not be imposed upon a resident of a quiet city. The exception to the general rule only applies, however, where the manufacturing establishments are so numerous that "one more would not add sensibly to the discomfort" (20 *N. J. Ch.*, 208). Thus it is that the instruction which Lord CRANWORTH, in his opinion in *St. Helens Smelting Co. v. Tipping (supra)*, referred to as having been given by him in a former case, viz: that the jury were not to consider "whether abstractedly, that quantity of smoke was a nuisance, but whether it was a nuisance to a person living in the town of Shields," has not been subjected to criticism.

But in reference to that large domain which lies

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between the extreme cases, it is to be observed that a person living in a town or city cannot stand upon his extreme rights, but must submit to the annoyances commonly arising from the usual trade and business carried on therein. In such instances there has been no perversion of property to extraordinary uses. But the same rule does not obtain as to erections and business not within the usual and ordinary purposes to which real estate is devoted. This exception was vindicated in *Carhart v. Auburn Gas Light Co.* (22 *Barb.*, 297), and cases there cited, and clearly applies to the chemical works of this defendant.

It is also said that the defendant's works existed before the plaintiff acquired his present residence, and before his house was built. This claim of priority is of no avail when the right to continue the works or business depends upon a term of less than twenty years (3 *Eq. Cas. E. L.*, 409; 2 *Bing. N. C.*, 134; 4 *Id.*, 183; 2 *Washburn on Real Property*, 3 ed., p. 236). In *Howard v. Lee* (3 *Sandf.*, 284), the defendant had carried on the business, creating the nuisance, many years before the Irving House (Howard's place) had existed. But, in granting relief, Chief Justice OAKLEY said: "All trades which render the enjoyment of life and property uncomfortable, must recede with the advances of population." It might also be justly said that neither the defendant in that case nor the defendant in this, had the right to assume that the vacant lots on the streets laid out in the vicinity of the works would remain unoccupied.

It must be confessed, however, that Chancellor KENT seems to have taken a distinction between the claims of a party who had occupied before the erection of the works creating the nuisance, and the claims of a party who came to the place after such erection. After stating the right of the former to the enjoyment of pure air as an incident to the estate, he adds: "On the other

hand, if a tan yard, for instance, renders the air of a house and garden subsequently established, adjoining it, less pleasant and salubrious, the nuisance is remediless as to the person who voluntarily plants himself near it" (3 *Com.*, 11 ed., p. 575).

If this proposition is to be accepted, it must be because the tanyard has to do with the usual or legitimate business or trade carried on in a town or city, and as to which, within the rule already stated, people may not stand upon their extreme rights; or as if it were put as an instance in which, by reason of the complainant's lawful act, a court of equity might well withhold an injunction. But in other aspects, the proposition, as I humbly conceive, is not correct. As a rule of law, it inculcates a doctrine dangerous and pernicious. It would have required, within such rule, but few tan yards and other like establishments to have left Murray Hill and the Brooklyn Heights, now the pride of two cities, uninhabited. In spirit and effect, private property would have been taken without compensation. But since the Commentaries were written, the question has been largely considered, and the plea that the complainant had come to the nuisance is not considered tenable.

The learned editors of *Smith's Leading Cases*, in the note to *Ashby v. White* (vol. 1, pt. 1, pp. 445, 446, Phil. ed. of 1866), refer with approbation to the instructions given in the case of *Hole v. Barlow*, as to carrying on business in a fit and proper place for the purpose; and in reference to *Bliss v. Hall* (4 *Bing. N. C.*, 185), and *Elliotson v. Feetham* (2 *Id.*, 134) are of opinion that the pleas held bad in those cases, might have been good on demurrer had they alleged that defendant had carried on his trade before the building of plaintiff's house, instead of merely setting up the prosecution of such trade before the plaintiff's occupation. In other words, that he came to the

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nuisance, not only to enjoy but to build his house. As a principle of pleading, the distinction is too formal. In the one case, the proprietor, out of deference to the offensive trade, leaves his house unoccupied; in the other, his land unimproved. But the learned editors, while freely using *Hole v. Barlow* as to the matter since overruled, overlook that part of the instruction given in that case, as to which, on review, no objection was made. In his instruction to the jury, Mr. Justice BYLES said: "It used to be thought that when a man went to reside near a place where he knew there was a nuisance, he could not complain of it, inasmuch as he went to the nuisance. That was supposed to be the law many years ago, but it is not so now" (4 C. B. N. S., 334).

In *Flight v. Thomas* (10 Adolph. & Ellis, 590), the jury found that the *mixon* used by the defendant and from which the offensive smells proceeded, was a nuisance, and that the plaintiff had come to it. But the plea did not set up that the *mixon* had been in use thus for twenty years, and the plaintiff had judgment *non obstante veredicto*.

But the question was put at rest in England, in the cases above cited, so fully that in more than one instance we find counsel admitting, against their own interest, that the proprietor of the works creating the nuisance could not justify by plea of a shorter term than twenty years, thus having a prescriptive right.

As a question of pleading, with us, it is sufficient if the plaintiff aver that he was the owner of the freehold affected by the nuisance, at the time the acts complained of were committed by the defendant (16 Barb., 565).

It is also urged that the section of the city where this defendant's works are situated, has no proper drainage; is malarious, and that sulphurous gas is a disinfectant. It is a disinfectant, and is so used, but, like

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other remedial agents, is to be used under limitations. I am not prepared to accept a sanitary theory, which, in the application of a disinfectant, has respect to no regulations for its distribution other than the winds may supply.

It is also claimed that these visitations of sulphurous gas, assuming them to have existed, were not continuous,—may not occur for several days or weeks. It was thus in most of the numerous cases, to some of which I have referred, in which the complaints were as to smoke, gas, and noisome odors wafted to dwellings in the neighborhood of the business to which objections were made. In one of the cases, the fires were to be so fed as to produce the smoke for about twelve hours only twice a month; and in another case, under the head of disturbing noises, the church bells were only rung occasionally. But, adopting the language of BRAMWELL, B. (3 B. & S., 84), “I cannot think that the nuisance being temporary, makes a difference.”

The injury caused by the fumes from the defendant's factory, has been more marked within the last two years than previously. This indicates some growing defect in the work, or some bad management. It may be that from some peculiarity of construction, the difficulty, whatever it may be, cannot be overcome. But I am satisfied, from the testimony of a witness, whose works in Williamsburgh cover six or seven acres, the largest chemical factory of the kind in the United States, that sulphuric acid can be manufactured without any appreciable escape of the sulphurous gas. He says that if it did escape, it would be known in the neighborhood; that if so escaping as to destroy vegetation, to set people coughing, their eyes smarting, there is something wrong about the works or their management, some escape where there should be none, and that he would find a remedy. That rem-

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edy this defendant must find, if he would continue his business in his present location.

The judgment, to be settled on notice, will be entered for the plaintiff, and the defendant enjoined from so conducting his business as to allow the gas to escape, to the injury of the plaintiff, the incidental damages allowed, and costs.

TOWN OF ROCHESTER *against* DAVIS.

Supreme Court, Third District; Special Term.
April, 1872.

COUNTY JUDGE.—CONTESTED MOTIONS.

A county judge has no jurisdiction to hear and decide a contested motion for an injunction order, in a cause pending in the supreme court.*

There is no distinction in this respect, between injunction orders, and orders to stay proceedings, &c.

Motion to vacate a preliminary injunction order.

The action was brought by the town of Rochester against Jacob Davis and others. The material facts are stated in the opinion.

Gros & Lyon, for the motion.

Westbrook & Cantine, opposed.

LEARNED, J.—An injunction order was granted by a county judge *ex parte*, containing a clause requiring the defendants to show cause before him at a certain

* See, also, *Town of Middletown v. Rondout, &c. R. R. Co.*, p. 276 of this vol.

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day, why the injunction order should not be continued. On the return day, upon reading the original and opposing affidavits, and upon hearing counsel for both parties, the county judge made an order continuing the injunction.

The defendants move to vacate.

It is beyond dispute, that a county judge has no jurisdiction to hear and decide a contested motion in the supreme court; and that his power extends only to such orders as are made out of court and *without notice* (Parmenter v. Roth, 9 *Abb. Pr. N. S.*, 385; Rogers v. McElhone, 12 *Abb. Pr.*, 292). An order to show cause, is equivalent to a notice of motion (*Ib.*).

In the case of Town of Rochester v. R. & O. R. R. Co. (p. 276 of this vol.), I had occasion to inquire whether this decision of the court of appeals included injunction orders and motions on notice for such orders; or whether, on the contrary, a county judge has, in respect to those orders, a power which he has not in respect to orders of less consequence. I became satisfied that the decision above mentioned, applies to injunction orders as well as to others. An injunction is now an order, not a writ (§§ 218, 400). And an application for an order is a motion (§ 401). This decision of the court of appeals is in harmony, not only with the general provisions as to the powers of a county judge, but also with the special provisions as to injunction orders (§§ 218, 223, 225). And in the present case, there can be no doubt that, on the return day, the county judge heard and decided a contested special motion. The parties on both sides appeared by counsel, read affidavits, and were heard for and against the order.

My attention, however, is called to the case of Harold v. Hefferman (42 *How. Pr.*, 241), in which it is said: "Any order that a county judge is authorized to grant as a judge of this court, out of court, *ex-parte*,

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he may certainly grant upon a hearing of the parties, and is as fully authorized to hear the parties upon the merits upon an order, or notice for that purpose, as a judge of this court at chambers. And this rule must apply to injunction orders as much as to orders to stay proceedings or any other of the class of orders known and distinguished as chamber orders." It will be seen, in that case, that the learned judge places injunction orders on the same footing as other orders; with which view I agree. He does not attempt to show that there is a distinction between an injunction order and any other; as was claimed by the plaintiffs in the case of Middletown v. R. & O. R. R. Co. But he says that a county judge may grant, *upon a hearing of the parties, any order* which he is authorized to grant *ex-parte*. This remark appears to be in conflict with the case of Parmenter v. Roth, above cited. The court there lay down the doctrine that a county judge can grant no order upon a hearing of the parties; that his power is limited to a class of orders which may be made without notice, and where the judge is willing to grant the order without notice; that where the judge requires notice of motion to be given, or grants an order to show cause, the application becomes a special motion, and can be heard and decided only by a judge of the court in which the action is pending. Following this decision, therefore, and agreeing with the case of Harold v. Hefferman, in applying to injunction orders the same rule as to orders to stay proceedings and the like, I must hold that a county judge has no jurisdiction to hear and decide a contested motion for an injunction order. The order in this case, made on the return day by the county judge was, therefore, void, and must be vacated. The pending order falls with it.

The decision in Parmenter v. Roth undoubtedly makes some difficulty in harmonizing rules 46 and 94

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of the supreme court, and section 401, subdivision 4 of the Code. But as that decision is an authoritative construction of the Code, to the effect that a county judge has no jurisdiction to hear a motion or notice, or on the return of an order to show cause, the rules must accommodate themselves to it, as best they may. They cannot confer a jurisdiction which the highest tribunal of the State has declared does not exist.

Motion granted.

MATTER OF JACOBS,

New York Common Pleas; Special Term, July, 1871.

IMPRISONED DEBTOR.

The order to show cause required by section 3 of 2 *Rev. Stat.*, 29, under title "Of voluntary assignments by insolvents, &c.," is an incident of the jurisdiction acquired by the officer before whom the proceedings are commenced, but not essential to it.

An order to show cause why the debtor should not be discharged before one of the judges (naming him) of the court of common pleas in and for the city and county of New York, is a sufficient compliance with the statute as to specifying the place of return.

In the absence of dispute on the part of the opposing creditors, where a court has judicial cognizance of the absence, from the county of his residence, of the officer before whom the proceedings were commenced, the fact of absence is to be regarded as established.

The State insolvent laws which provide for the discharge of insolvents from imprisonment are not suspended by the passage of the bankrupt act of Congress.*

Petition of Solomon Jacobs to be discharged from

* Otherwise of the State laws which give a discharge from debts. *Shears v. Solhinger*, 10 *Abb. Pr. N. S.* 287.

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imprisonment, under 2 *Rev. Stat.*, 28, Art. 5, entitled, "Of voluntary assignments by an insolvent, for the purpose of exonerating his person from imprisonment."

LARREMORE, J.—Several preliminary objections have been raised as to the jurisdiction and validity of this proceeding.

The elaborate arguments of the counsel engaged therein, deserve a more careful and extended investigation than the present opportunity affords.

The petitioner is in custody, and the exigencies of the case demand an early adjudication of the question involved.

I must content myself, therefore, with a brief statement of the reasons that influence my decision.

This proceeding was commenced by the debtor, for the purpose of exonerating his person from imprisonment, in pursuance of article 5, chapter 5, title 1, part 2 of the Revised Statutes.

The presentation of the petition and schedule, duly verified as required by section 1 of said article, conferred jurisdiction upon the officer before whom these proceedings were commenced.

The order to show cause, required by section 3 of said article, was an incident of, but not essential to, such jurisdiction (*Soule v. Chase*, 1 *Abb. Pr. N. S.*, 48).

By said last mentioned section, said order must require the creditors of the insolvent "to show cause before the said officer at a time and place to be specified in the order, why the prayer of the petitioner should not be granted."

The order in question requires the creditors to show cause before FREDERICK LOEW, one of the judges of the court of common pleas in and for the city and county of New York.

I think this specifies the place of return, and is a substantial compliance with the statute.

Besides, the opposing creditors were not misled by the notice, but have appeared in answer to it.

The assignment of the insolvent's estate for the benefit of his creditors, and his discharge from imprisonment, are the relief sought under these proceedings; and to apprize the creditors of that intention on the part of the debtor, was a proper notice to them to show cause why the prayer of the petitioner should not be granted.

Section 5 of article 7 provides (among other causes), that in case of the absence from the county of his residence of any officer before whom these proceedings may have been commenced, they may be continued by any other officer residing in the same county, who might originally have instituted such proceedings, &c. It is not provided in what manner the fact of such absence shall be ascertained, nor by whom it must be affirmatively shown. I have judicial cognizance of the fact, that the officer before whom these proceedings were commenced, is now absent from the county of his residence, and unless the opposing creditors are prepared to dispute it, I shall regard this fact as established.

It was further urged, that the insolvent having been adjudged a bankrupt, and having made an assignment of his property, in pursuance of the "Act to establish a uniform system of bankruptcy throughout the United States," is precluded from making this application to exonerate his person from imprisonment; that Congress having legislated upon the question of *bankruptcy*, the *insolvent* laws of the State, so far as they affect the same subject matter, are suspended.

The authorities cited unquestionably establish the proposition, that the power delegated to Congress to establish uniform laws on the subject of bankruptcies throughout the United States, is exclusive in its exercise, when Congress has legislated upon the subject.

But I have failed to discover any ground for the

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theory that the State insolvent laws which provide for cases and remedies other than those mentioned in the bankruptcy act, are thereby suspended.

By that act, the party is discharged from his debts.

This application is made by the insolvent, to be discharged from imprisonment, not from his debts, which are not affected or impaired by such discharge. Upon this subject, Congress has not assumed to legislate, and the State laws in reference thereto are still in force.

The preliminary objections must be overruled.

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Jan. 48/1.

TOWN OF MIDDLETOWN *against* RONDOUT & OSWEGO RAILROAD COMPANY.

Supreme Court, Third District; Special Term, March, 1872.

INJUNCTION.—CONTESTED MOTION.—POWER OF COUNTY JUDGE.

The Code of Procedure (§ 225) authorizes a motion to dissolve a preliminary injunction to be made before an answer to the complaint is put in.

A county judge cannot make an order to show cause why an injunction should not be continued, returnable before himself.*

The decision in *Parmenter v. Roth* (9 *Abb. Pr. N. S.*, 385), that a county judge cannot decide a contested motion, applies to the granting of injunction orders.

Where an injunction order was granted, restraining the defendants until further order, &c., and also requiring them to show cause, on a day named, why the order should not be continued,—*Held*, that

* To the same effect, compare *Town of Rochester v. Davis*, page 270 of this vol.

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the order was an *ad interim* order, and ceased on the day for showing cause, unless it was then continued by a valid further order.

An injunction order which forbids an incorporated railroad company from leasing or selling any part of the property of the company, is an injunction which suspends the "general and ordinary business of a corporation," within section 224 of the Code, and 1 *Laws of* 1870, p. 421, ch. 151, § 1, and cannot be granted by a county judge.

It seems, that an injunction restraining the corporation from entering into a particular contract for the building and equipping of the road, would be of the same nature.

Motion to vacate an injunction.

The facts are stated in the opinion.

Mr. Bartlett, for defendants Green and Satterlee, and *Mr. Hand* and *Mr. Schoonmaker*, for the other defendants, in support of the motion.

Mr. Westbrook and *Mr. Cantine*, for the plaintiffs, opposed.

LEARNED, J.—This action is brought in behalf of the plaintiff and all other stockholders, against the railroad company, its directors, and Messrs. Green and Satterlee. The complaint alleges that the plaintiff prosecuted "by the direction of certain persons who are commissioners of the plaintiff," under what is called the bonding act. It alleges that the railroad company have entered into a certain contract for construction with defendants, Green and Satterlee, and it asks that the contract be annulled, and that both a temporary and a final injunction be granted against carrying it into execution. The grounds of this relief are four: First, that the contract is exorbitant; second, that it is in violation of an agreement between the railroad company and plaintiff; third, that it contains a lease of the road for ten years; and fourth, that Green and Satterlee are pecuniarily unable to perform their agreement.

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The complaint is verified in the usual form by three persons, who state that they are commissioners of the plaintiff. It has attached to it also a verification, in the usual form, by a person not a party to the action, and also an affidavit by one of the attorneys as to the truth of the facts relative to the aforesaid agreement. The allegations in the complaint, as to all the terms and conditions of the contract, are on information and belief; those as to the pecuniary ability of Green and Satterlee are on information only.

Upon these papers an injunction order was granted on February 5, 1872, by the county judge of Ulster county, the place of trial, enjoining the defendants from executing or consummating a lease or sale of the railroad, its property or franchises, or any part thereof, or any interest therein, to Green and Satterlee, or any other person; and concluding as follows: "Until the further order of the court in the premises, and you are hereby further required to show cause before me at my office in the village of Rondout, on February 14, 1872, at ten o'clock A. M., why this order should not be continued."

On February 14, neither plaintiffs nor defendants appeared (*i. e.*, in the legal sense) before the county judge, and no further order was then or has since been made by him in the matter. The defendants, Green and Satterlee, by their attorneys appearing especially for this motion, and the other defendants by their attorneys appearing in like manner, now move to vacate the injunction, and for other relief, on the original papers, and also on affidavits served, and the plaintiffs read other affidavits in reply.

The grounds of these motions are several, and it will be necessary to examine them in detail.

Preliminarily, however, the plaintiffs object that such a motion cannot be made before answer. This was a general but not an inflexible rule, under the old

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practice (*Mallett v. Weybosset Bank*, 1 *Barb.*, 217). But the language of section 225, which authorizes the defendant to make the motion "with or without the answer," has, I think, established a different rule. The plaintiff urges that this section means only that, in making the motion, the defendant may or may not use the answer which he has served.

But if he may make the motion without using his answer, what need is there of waiting until his answer has been put in? Under the present practice, injunctions are to be granted and dissolved upon affidavits, and it is only as an affidavit that the answer is used on a motion to dissolve. This subject is so fully and clearly discussed by Judge WOODRUFF, in *Fowler v. Burns* (7 *Bosw.*, 637), that I need only refer to that case. I do not think that the preliminary objection can prevail.

The defendants urge that the injunction order is irregular, in that it requires the defendants to show cause before the county judge. It is to be observed, at the outset, that an order to show cause is only equivalent to a short notice of motion (*Code*, § 402; *Parmenter v. Roth*, 9 *Abb. Pr. N. S.*, 385, 393). The party obtaining the order is the moving party on the hearing (*New York & Harlem R. R. Co. v. Mayor*, 1 *Hilt.*, 562; *Thompson v. Erie Railway Co.*, 9 *Abb. Pr. N. S.*, 233, 238). The hearing, therefore, ordered to be had before the county judge on February 14, was the hearing of a motion on notice. What is called an injunction is expressly an order (§ 218). It is also within the general definition (§ 400). An application for an order is a motion (§ 401).

A county judge has no jurisdiction to hear or decide a contested motion. His power extends only to such orders as are made out of court, and without notice (*Parmenter v. Roth*, 9 *Abb. Pr. N. S.*, 385; *Rogers v. McElhone*, 20 *How. Pr.*, 441; *S. C.*, 12 *Abb. Pr.*,

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292). It is said on the part of the plaintiff that these decisions do not apply to the granting of injunction orders. The statement of the doctrine, however, by the court of appeals, is not restricted. The power of the county judge, they say, is limited to a class of orders which may be made without notice, and to which the applicant exhibits a right so plain that the judge is willing to grant the order without notice. But when the case is not so clear, the judge may require notice or grant an order to show cause. The application then becomes a special motion, and it can only be heard and decided by a judge of the court in which the action is pending. See *Parmenter v. Roth* (9 *Abb. Pr. N. S.*, 385, 393).

In the case of injunction orders, a power to grant them is given by section 218 to the court, a judge thereof, or a county judge. This is substantially the same provision as to injunction orders which is made general as to all orders in section 401, subdivision 3. Section 223 provides that if a court or judge deem it proper that the defendant should be previously heard, an order may be made to show cause. This order to show cause is to be returnable at a specified time and place; not necessarily before the same judge. It must be at a time and place when and where a contested motion can be heard, and, of course, before some one competent to hear it. This section, therefore, does not settle the question *who is* competent to hear a contested motion.

In section 225 it is said if the injunction be granted by a judge of the court, or a county judge, without notice, "the defendant, at any time before trial, may apply upon notice to a judge of the court," &c. The plaintiff argues that this (substantially included in section 324), implies that a county judge may grant an injunction without notice. But I do not think that this is the true meaning. By section 218 the power to

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grant injunction orders is given to three authorities : the court, a judge of the court, and a county judge. If the order should be granted by the court, even without notice, it would hardly seem right that *a judge* should be authorized to vacate it. An order made by the court should of course be vacated only by the court. Section 225, therefore, limits the cases where a motion to vacate may be made before a judge of the court to those in which the order was granted by a judge of the court or a county judge. And as a judge of the court may grant the order with notice, it was necessary to limit the cases in which a motion to vacate might be made to those in which the order was originally made without notice. But the remainder of the section, by clear implication, shows that the county judge cannot hear a contested motion as to an injunction, because it requires the motion on notice to vacate shall be made before the judge of the court.

If then a county judge cannot hear a motion on notice to vacate an injunction order, why should he be allowed to hear a motion on notice to continue such an order? Each motion brings up the merits similarly on a hearing of both sides. It appears to me, therefore, that the decision in *Parmenter v. Roth* applies to injunction orders. It follows from this that the county judge had no jurisdiction to hear the motion which he required the defendants to oppose before him on February 14. If they had appeared and opposed as they were required to do, and he had, on that day, upon such hearing, made an order continuing the injunction, such order would have been void for want of jurisdiction. And, in like manner, if the defendants had failed to appear, and the plaintiffs, on proof of notice and on the defendant's default, had taken an order continuing the injunction, that also would have been void.

The question then arises, is the order granted by

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the county judge restraining the defendants, still in force? The language of this order restrained the defendants until the further order of the court, and at the same time required them to show cause why the order should not be *continued*. Supposing, for the present, that a county judge has authority to hear a contested motion, then if the plaintiffs had failed to appear on the return day, the defendants could not have brought on or opposed the motion for a continuance of the order. They might have had costs for plaintiffs' failure to bring on the motion, but they would have no power to bring on the motion themselves. The motion was to be made by the plaintiffs for a continuance of the injunction order, and they only could bring it on.

If, therefore, the proper construction of an order, such as that of February 5, is that the injunction is to continue until it is vacated, then the plaintiffs, by neglecting to bring on the motion to continue the order, can make the injunction permanent. That part of the order requiring the defendants to show cause becomes meaningless. By such an order the plaintiff gives a short notice of motion to continue an injunction. Is it reasonable to construe the order to mean, that if the plaintiff fails to bring on and obtain a continuance of the injunction, still the injunction is continued by plaintiff's neglect? If this be the construction, it would be best for the plaintiff never to appear on the return day. And again, if the injunction continues without any further action of the plaintiff, why should he give notice of a motion to continue it? This very notice of motion implies that unless then continued by order of the court, the injunction will cease to be in force.

It seems to me, therefore, that the "further order of the court," mentioned in the order, has reference primarily to an order to be made on the return day, and that the order granted on February 5, was, in its

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real effect, like an order under section 223, providing for an *ad interim* restraint until the defendants could be heard. This is a case in which the judge might with great propriety deem it proper that the defendants should be heard before granting the injunction, and yet might restrain them meantime, as is provided in that section. The importance of the case, the magnitude of the interests involved, and the difficulty of the questions arising, would naturally make any judicial officer wish to hear both sides before granting an order which might be very injurious.

An injunction order should not be strained beyond the necessity of the case. If the proper object could be accomplished by an *ad interim* restraint until the hearing of both sides, this is the safer and wiser construction. I am aware that in *Kelly v. Joraleman* (7 *Robt.*, 158), the superior court at special term denied a motion by the plaintiff to continue an injunction, holding that an order continued itself. The objection was not taken by the counsel on the hearing. And it is to be observed that in that case the judge practically, by his decision, refused to hear the defendant's objections to the injunction. He held in effect that no such motion could be made; that the injunction was permanent; and that the defendant could be relieved only on a motion to vacate. I think that this decision cannot now be followed; for rule 94 has provided expressly for such a motion as that which was then before the court; and that rule does not mean that the judge shall do nothing on the return day. On the return of an order to show cause why an injunction should not be continued in force, if both parties appeared and the judicial officer had jurisdiction, he would not *now* refuse to hear the views of both, and to decide accordingly,—continuing the injunction or refusing to continue it, as he saw good cause.

There is another consideration which tends to show

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that the order granted on February 5, must be construed as an *ad interim* order only. The object of rule 94 was plainly to restrict the practice of granting permanent orders of injunction *ex-parte*. It intends, therefore, to provide that an *ex-parte* injunction order shall be at the most for ten days, and that within that time the plaintiff shall make good his right to a continuance of the injunction, after giving the defendant an opportunity to oppose. If the construction claimed by the plaintiff is to stand, then rule 94 is utterly valueless. For the plaintiff has only to neglect to appear on the return day, and by that neglect his injunction remains permanent. Or he may appear and refuse to bring on the motion to continue, and then the same result is accomplished. Such was the course of the plaintiff in this case. They did not appear (legally) on the return day, and their non-appearance was (as they claim) as effective as the most powerful argument in their behalf could have been.

I am aware of the difficulties which may arise in harmonizing section 218 and section 401, subdivision 4 of the Code; rule 46, paragraph 2, and rule 94, and the decision in *Parmenter v. Roth*. But it is not necessary to consider those difficulties here.

For these reasons I am of the opinion that the order granted by the county judge, on February 5, was only an *ad interim* order, and that, as the injunction was not continued on the 14th, it has ceased, and that there is now no injunction to be vacated.

With these views, it is unnecessary for me to examine the merits of the motion.

But perhaps one further point should be considered. The defendants urge that the injunction order was void, under section 224 of the Code, and chapter 151 of the *Laws of 1870*. By these provisions an injunction to suspend the general and ordinary business of a corporation can be granted only by the court, and on eight

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days' notice. These provisions are not a limitation as to the grounds upon which a party may be entitled to an injunction, but only as to the tribunal which shall grant it, and the notice on which it shall be had. They assume that sometimes an injunction may properly be granted to suspend the general and ordinary business of a corporation, but require that it be granted by the court.

In examining what is meant by an injunction to suspend the general and ordinary business of a corporation, some points are to be observed. The statute limitation as to the powers to grant injunctions may apply : 1. Although the injunction does not contain the words "general and ordinary business." 2. Although it suspends only a part of such business. 3. Although the corporation is acting illegally in respect to the general and ordinary business which is sought to be restrained. 4. Although the corporation has the power to carry on such business in some manner other than that which is sought to be restrained.

In the present case the complaint sets forth that a contract has been made by the company with two of the defendants, for the construction of the road, and that this contract includes a leasing of the road to these contractors, and the complaint asks an injunction against carrying this contract into effect. The injunction order, which was granted, does not in terms confine itself to restraining the carrying that contract into effect; but it forbids the leasing or selling any part of the property of the company to any person. It goes far beyond any matters alleged to have taken place, or even to be threatened. There are no allegations on which to base such a sweeping restriction. The company could not sell a worn out rail without violating the injunction, if the language is to be construed literally. And the injunction, in its literal construction, seems to me in effect to suspend the general

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and ordinary business of the corporation. The injunction ought to have been confined in words to the contract set forth in the complaint.

But even giving it that construction it is then a restraint on the corporation from carrying out a certain contract for the construction of their road. Is not the building and equipping of a road a part of the general and ordinary business of the railroad company? Whether or not they can lawfully do this by the means which they propose to adopt I do not inquire. Perhaps they can build it in some other way better and more profitably. But the building of the road is their ordinary business, and to do that ordinary business they make the contract which is enjoined. I do not say that it is legal or not; nor do I say whether or not they should be enjoined from the means by which, according to the complaint, they are undertaking to build their road. Even assuming that the injunction is one which the proper authority ought to grant, still, as I think, it suspends part of the general and ordinary business of this company.

The legislature, owing to events which are well known, has thought best to protect corporations, as to their general and ordinary business, from injunctions granted *ex-parte*, and out of court. The same act in like manner limits the power of granting an injunction to restrain any director from the performance of his duties as such. And this present injunction comes within that limitation also. It cannot be said that because this injunction restrained the directors from an alleged violation of duty, therefore the act does not apply. For all injunctions in such cases are to restrain supposed violations of duty. And no such absurdity was intended as that a county judge *ex-parte* might prohibit violations of duty in a director, but only a court on notice could prohibit a director from doing his duties properly.

Brower v. Mayor, &c. of New York.

Nor do I think that it can reasonably be said that this provision refers to a complete prohibition of a director from performing any of his duties. Otherwise by an *ex-parte* injunction out of court a director could be prohibited from performing all his *important* duties, leaving him free to discharge some that were unimportant. Thus the evil against which this legislative act was aimed might be revived.

All who remember the history of railroad litigation within the few years past, will acknowledge the wisdom of the legislature in protecting corporations and their officers from *ex-parte* interferences by injunctions. And in using the language "general and ordinary business" it appeared to me that they intended to make this protection broad. Thus the business which corporations were created to carry on is not to be suspended, nor are their directors to be restrained, from the discharge of their official duties, except by the court and upon notice.

It is therefore proper that the injunction order, although it has expired, should be set aside as contrary to these provisions, with costs to the defendants.

Elias v. Babcock.

ELIAS *against* BABCOCK.

*New York Common Pleas; Special Term, February,
1872.*

APPEAL.—NOTICE TO LIMIT TIME.

Where the successful party treats the case as one in which a notice of the entry of judgment is necessary, in order to limit his adversary's time to appeal, and accordingly gives him such notice, a notice of appeal seasonably served after such notice is enough, and the party cannot object that the notice of appeal should have been served within twenty days after judgment.

DALY, Ch. J.—The defendant has treated this as a case in which it was necessary to notify the plaintiff that judgment had been recovered against him, which he did by serving upon the plaintiff a written notice of the fact and of the time of the recovery of the judgment, and the plaintiff served his notice of appeal within twenty days after the service of this written notice (see *Code of Procedure*, §§ 332, 352). The defendant will be held concluded by his own act, and will not now be allowed to go behind it and object that the notice of appeal should have been served within twenty days after the entry of the judgment. To hold otherwise, would be to allow him to take advantage of an act by which, though he may not have so intended, he evidently misled the plaintiff as to the time from which the twenty days were to run.

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MALONY *against* HORAN.*Court of Appeals.*ESTOPPEL IN PAIS, BY DEED, AND OF RECORD.—MER-
GER.—EFFECT ON DOWER, OF JUDGMENT
SETTING DEED ASIDE.

One of the elements of an estoppel *in pais* is, that the party setting up the estoppel should have relied on the statements made or acts done which are claimed to make an estoppel. Unless this appear affirmatively, a case of estoppel will not be made out.

The rule that a judgment is final and conclusive upon the parties to it, as to all matters which might have been litigated and decided in the action, is applicable to such matters only as might have been used as a defense in that action, against an adverse claim therein.

The release of dower which a married woman makes by joining with her husband in a conveyance of his land, operates against her only by estoppel, and can be taken advantage of only by those who claim under that conveyance.

Where a husband, by a deed in which his wife joined to release dower, conveyed to a third person, who conveyed back to the wife, and subsequently both deeds were set aside as being fraudulent as against creditors,—*Held*, that the wife's inchoate right of dower was not merged in the fee conveyed to her, so as to prevent her from claiming it, after the deed to her was set aside.

Appeal from a judgment.

Eliza Maloney, as widow of Patrick Maloney, deceased, brought an action in the supreme court to recover her dower interest in certain lands.

Patrick Maloney, her husband, being the owner of the premises, had, on November 11, 1864, conveyed them to his brother, Michael Maloney, for a consideration of one dollar, and in this conveyance the plaintiff had joined, and released her dower in the usual form.

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On December 28, 1864, Michael Maloney conveyed the premises to plaintiff. Both these conveyances were duly acknowledged and recorded.

Subsequently a judgment was obtained against Patrick Maloney, and in an action brought by a receiver, in which action Michael and Patrick Maloney and the present plaintiff were defendants, and appeared and answered, the above mentioned conveyances were all declared void as to the creditors of Patrick Maloney, and the premises were ordered to be sold. Under this order, the receiver sold the premises to John J. Conklin, for six thousand one hundred dollars, subject to a mortgage of seven hundred and fifty dollars; and Conklin assigned his bid to Horan, the defendant in the present action. On the morning of the sale, and prior to the property being offered for sale, the plaintiff called at Horan's place of business and asked him to attend and bid, informing him that she had no claim upon the property. Conklin, the purchaser, was present at this time. The plaintiff, Horan and Conklin attended the sale, and were present when the terms of sale were read, in which no mention was made of plaintiff's right of dower.

The court having found these facts, decided that plaintiff had no estate of dower in the premises, and dismissed her complaint.

An appeal was taken from that decision to the to the court at general term (reported in 53 *Barb.*, 29; S. C., 36 *How. Pr.*, 260), where it was affirmed. Plaintiff appealed to the court of appeals.

Samuel Hand and *Amasa A. Redfield*, for plaintiff, appellant.—I. A doweress is favored in law, and proceedings to secure her dower should be encouraged (1 *Story Eq. Jur.*, § 629; *In re Slipperly*, 44 *Barb.*, 370). No act of the husband's can prejudice the wife's

right to her dower (*Denton v. Nanny*, 8 *Barb.*, 618; 1 *Rev. Stat.*, 742, § 16).

II. (1.) A release of dower can operate only as a release (*Halstead v. Eldridge*, 2 *Halst.*, 372; *Douglass v. McCoy*, 5 *Ohio*, 527; *Powell v. Morison, &c., Manfg. Co.*, 3 *Mason*, 347; *Hall v. Savage*, 4 *Id.*, 273; *Barker v. Parker*, 17 *Mass.*, 564). (2.) In this case, the deed being declared void, the release ceased to operate (*Summers v. Babb*, 13 *Ill.*, 483; *Blair v. Harrison*, 11 *Id.*, 384; *Stinson v. Summers*, 9 *Mass.*, 143).

III. The plaintiff is not estopped from claiming her dower by reason of her having joined in the fraudulent conveyance of her husband, because, 1. The defendant is a stranger to the release, and an estoppel must be mutual and reciprocal. A release of dower is binding only as against the releasee and his privies (*Littlefreed v. Crocker*, 30 *Maine*, 192; *Harriman v. Gray*, 49 *Id.*, 537; *Pixley v. Bennett*, 11 *Mass.*, 298; *Blain v. Harrison*, 11 *Ill.*, 384; *Robinson v. Bates*, 3 *Metc.*, 40; *Taylor v. Fowler*, 18 *Ohio*, 567; *Woodward v. Paige*, 5 *Id.*, 70; *Ketzmiller v. Van Rensselaer*, 10 *Id.*, 63; *Summers v. Babb*, 13 *Ill.*, 483; *Gore v. Cather*, 23 *Id.*, 634; *Harrison v. Eldridge*, 2 *Halst.*, 392; *Richard v. Talbird*, *Rice Eq. So. C.*, 158; *Pierson v. Williams*, 23 *Miss.*, 64; *Randolph v. Doss*, 3 *How. [Miss.]*, 205; *Gray v. McCune*, 23 *Pa. St.*, 447-451). (2.) The defendant is not a privy to the deed or to plaintiff's release (*Ketzmiller v. Van Rensselaer*, 10 *Ohio*, 63; *Taylor v. Fowler*, 18 *Id.*, 567; *Harrison v. Eldridge*, 2 *Halst.*, 392; *Gore v. Cather*, 23 *Ill.*, 634; *Robertson v. Bates*, 3 *Metc.*, 40). (3.) Even if defendant was a privy to the deed, plaintiff is not estopped, since she was not a party to the fraud, nor could she have been, since by her release she placed nothing beyond the reach of creditors, to which they were entitled, or could obtain by any process of law (*Woodworth v. Paige*, 5 *Ohio*, 70; *Miller v. Wilson*, 15 *Id.*, 108).

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IV. There was no estoppel *in pais*, since it did not appear that plaintiff's statements to defendant were intended to mislead. This is necessary (*Lawrence v. Brown*, 5 *N. Y.* [1 *Seld.*], 394; *Chatauqua Co. Bank v. White* 6 *Id.*, 236; *Jewett v. Miller*, 10 *Id.*, 402). (2.) The defendant was not misled. (3.) He did not act upon her statements.

J. J. Armstrong, for defendant, respondent.

FOLGER, J.—The plaintiff shows that she was the wife of Patrick Maloney in his lifetime; that during coverture, he was seized in fee of the premises, in which she now demands dower; and that before the commencement of her action he departed this life. She thus makes a *prima facie* case for a judgment in her favor.

The defendants rely upon four grounds to defeat the case made by her :

1. An *estoppel in pais*; which is claimed to arise, from the plaintiff calling on the defendant Horan, and asking him to attend and bid at the receiver's sale of the premises, taking place after the death of her husband; stating that she had no claim thereon, or nothing therein; and from her afterwards attending at the sale with Horan, and with Conklin, the purchaser thereat, and being present at the reading of the terms of sale, in which no mention is made of any right in her.

In the finding of fact, in which it is sought to rest this *estoppel in pais*, there fails to appear, at least one material element of that kind of estoppel. It is not shown, nor is it necessarily to be inferred from what is found, that the declaration, acts, or omissions of the plaintiff, influenced the conduct of Horan or Conklin, or that they took any action in the matter in reliance thereon.

This ground, therefore, cannot avail the defendants.

2. An *estoppel by record*, which is claimed to arise from the judgment in the action in behalf of the creditors of the husband of the plaintiff, setting aside the deed from him and her of the premises, and the deed of the same to her from their grantee, and directing a sale of the premises in the action in which the judgment was rendered, she being a defendant and appearing and answering; in which judgment, there was no recognition of her dower right, nor any provision in regard to it, nor anything to show that she claimed its existence. She is bound by that judgment, whatever may be its legitimate effect. The judgment is final and conclusive upon her, as to all matters put in issue and litigated in the action (*Clemens v. Clemens*, 37 *N. Y.*, 59). But as stated above, the matter of her inchoate right of dower was not put in issue and litigated therein.

It is claimed that the rule goes further; and that the judgment is final and conclusive upon the parties to it, upon all matters which might have been litigated and determined therein. It is asserted (*Le Guen v. Gouverneur*, 1 *Johns. Cas.*, 436, and note to *Shepard's ed.*). The plaintiff in this action might have raised in that action, the question that she had a right of dower, as yet inchoate, but which might become complete; and might have asked that if it should be found to exist, the judgment should make provision therefor (*Vartie v. Underwood*, 18 *Barb.*, 561). But was she bound to do so? This would not have been matter in direct opposition to the action, in defense of the claim made by the plaintiff therein; it would have been a *quasi* admission of the cause of action set up, and a seeking for relief, in the judgment which must follow. And when the authorities say, that a judgment is final and conclusive upon the parties to it, as to all matters which might have been litigated and de-

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cided in the action, the expression must be limited, as applicable to such matters only, as might have been used as a defense in that action, against an adverse claim therein; such matters as if now considered, would involve an inquiry into the merits of the former judgment (*Whitcomb v. Williams*, 4 *Pick.*, 228; *King v. Chase*, 15 *N. H.*, 13). The existence of inchoate right of dower in the plaintiff, would not have been a defense to the action of the receiver, for a sale of the premises, and a satisfaction from the avails of the sale, of the judgment debt which he represented. It could not, if pleaded and shown, have prevented a judgment substantially such as that which was rendered. The most which could have been effected, would have been to have secured in the judgment, an ancillary provision recognizing and protecting the contingent right. And again: It was a right pre-existent to the claims and defenses there litigated, and paramount to any right of the plaintiff's in that action there sought to be enforced. It is also to be remarked, that the printed case does not show what were the allegations in the complaint, in the action brought by the receiver, and that what is here said is upon the presumption, that there were no averments there, raising the question of the right of dower in the present plaintiff, nor do the findings of fact show that the right of dower was at all called in question, nor that any issue made by the pleadings affected it, nor that any circumstances of the action or of the trial made it necessary to insist upon it (see *Lewis v. Smith*, 5 *Seld.* [9 *N. Y.*], 502; *Yates v. Fassett*, 5 *Den.*, 21).

We are of opinion, that the plaintiff is not estopped by the record in the action brought by the receiver.

3. The third ground taken by the defendants, is, that by joining with her husband in the conveyance to Maloney, the plaintiff released all her right of dower in the premises. And, though it is suggested in an-

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swer thereto, that the deed having been declared void as against the creditors of the husband, and adjudged to be cancelled of record thereby, the title is restored to the husband and the right of dower may again arise, it is replied thereto, that a deed, though fraudulent as against third persons, and subject to be set aside as void therefor, is yet good and valid as between the fraudulent parties to it, and that the fee of the lands has passed by it, so that the grantor cannot call it back. And if the grantor, the husband, cannot recall the fee, and it has passed from him, then, as it is claimed, has the wife, by joining in the conveyance, effectually and forever released her right of dower. If it should be conceded, that the wife, by such act, has effectually released her right of dower, to the fraudulent grantee and his assigns, it is not yet determined that she is debarred of her right, as against one claiming the premises from a source other than him or them, and indeed in hostility to him and to them. For what is the effect and operation of a release by a wife, of her inchoate right of dower? She cannot, nor can a widow until admeasurement, convey or assign her dower. The joining with the husband in his conveyance, is then but a release by the wife of a contingent future right, and operates against her but by way of estoppel (*Tompkins v. Fonda*, 4 *Paige*, 448). And it is said that she cannot execute any valid release of her dower in the real estate of her husband in any other way than by joining with him in a conveyance to a third person (*Carson v. Murray*, 3 *Paige*, 483). The release must, at all events, accompany or be incident to, the conveyance of another. And the right of dower again attaches, upon a re-conveyance of the real estate to the husband, or upon his becoming in any other manner vested in his own right with the title thereto (*Ib.*). And inasmuch, as the release of dower, to be operative, must be in conjunction with a conveyance or other in-

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strument which transfers a title to the real estate, it follows, that if the conveyance or instrument is void or ceases for any reason to operate, and no title has passed or none remains, the release of dower does not, after that, operate against the wife, and she is again clothed with the right which she had released. Such is the familiar case of a wife joining with her husband in the execution of a mortgage, and thereby releasing her right of dower. On the satisfaction of the mortgage, her right is restored. And so when a deed has been executed by the husband, with full covenants, in which the wife has joined, releasing her dower, and afterwards, the grantee has sued for a breach of the covenants and has recovered full damages, it has been held, the husband dying, that the widow has a right of dower in the premises (*Stinson v. Sumner*, 9 *Mass.*, 143). The ground upon which that decision is placed, comports with reason. It is, that the judgment in an action on the covenants in a deed, goes upon the ground that nothing has passed by it to the grantee. If nothing has passed by it to the grantee, then the grantor has retained all that which he had when he executed the deed. And the wife of the grantor retains with him all that she had. The principle which governs is this. The release of an inchoate right of dower which a married woman makes by joining in a conveyance with her husband, operates against her only by estoppel. An estoppel must be reciprocal, and binds only in favor of those who are privy thereto. A release of dower can be availed of, then, only by one who claims under that title which was created by the conveyance with which the release is joined. A release to a stranger to that title, does not extinguish the right of dower (*Harriman v. Gray*, 49 *Maine*, 537). It shows no privity of estate, or connection of any kind between the doweress and the tenant (*Pixley v. Bennett*, 11 *Mass.*, 298). But when a creditor of a husband pursues him to judg-

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ment, and attacks as fraudulent, and sets aside as void, the deed from him, joining in which, the wife has released her right of dower, he does not connect himself with the title which that deed has created, and with which the release of dower is connected. He sets up the title of the husband as it existed, before the fraudulent conveyance, and stands in hostility to the title which it has given. Not being a party to the release or in privity with it, he may not set it up in bar of dower.

We are of the opinion that the defendants cannot successfully stand upon this ground.

The research of counsel has not furnished us with any decision of the courts in this State, directly upon this point. The *Manhattan Co. v. Evertson* (6 *Paige*, 457) is cited by the defendants. At first reading it seems to make for them. But look how the question came up there, and between what contestants it was to be determined, and it will be seen that the decision there may be maintained and not clash with our conclusion. That was a contest for the distribution of surplus moneys arising upon the sale of lands on the foreclosure of a mortgage prior to all the claims in dispute. It was then in theory, a dispute as to the residue of land; the same as if fifty acres having been taken from seventy-five to satisfy the mortgage, who shall have the balance which is left (*Matthews v. Duryee*, 45 *Barb.*, 69). The only contestants as to the right of dower, were the widow on the one hand, and the grantee of the husband and wife to whom she had released her dower, and the mortgagee of that grantee, on the other.

The deeds which had been executed were held valid as to the trusts specified in them, but inoperative after that, as against the creditors of the husband. It is obvious that the only question arising on these facts, and between these litigants was, whether a deed valid as to

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a part of its purposes, and invalid as to a part, should be held so effectual between the parties to it, as that the grantee therein and those in privity with him as such, could set up the release of right of dower therein contained against the wife who had executed it, when, as widow, she claimed dower. That question was solved by the consideration, that had the deed been absolutely void as against creditors, yet it transferred the legal title to the grantee as against the grantors; and that had it created a valid legal title subject to resulting trusts in the husband, the widow could not be endowed of a mere equity. The principle here involved was not considered, nor did it need to be considered. *Meyer v. Mohr* (19 *Abb. Pr.*, 299; S. C., 1 *Robt.*, 333) is also cited by the defendants. It is there held, that the wife having united with her husband in a fraudulent deed, had divested herself of her inchoate right of dower, and was not entitled to any protective provision, in a judgment setting aside the deed as void against creditors, and ordering a sale. The question does not appear to have been fully considered there. We are constrained to differ from the conclusion there reached. In *Den ex dem. v. Johnson* (3 *Harrison [N. J.]*, 87), it was held that a wife was not incapacitated by interest from testifying as a witness that a deed which had been executed by her and by her husband was fraudulent. The action was between one claiming the premises as a purchaser at sheriff's sale, on a judgment against the husband prior to the deed, and one claiming under the deed alleged to be fraudulent.

If the wife by her testimony should sustain the deed, her dower was barred by it. If she showed that the deed was fraudulent, then, if we are right, the grantee in it might be dispossessed, and her right of dower restored to her, as against the purchaser at the sheriff's sale. Her interest was to protect the deed. But it was held in that case, that the alleged fraudu-

lent deed being good against the grantors, her dower was unquestionably gone, and that by showing it fraudulent as to creditors, she did not thereby restore her husband's title to the land, nor her own right to dower. It will be perceived that the question presented to us was not raised, at least with distinctness, in the learned court which passed upon that case, as is evident from the citations with which the decision is sustained, which are all to the point, only, that as between parties to a deed both fraudulent the deed is valid (*Osborne v. Morse*, 7 *Johns.*, 161; *Jackson v. Garnsey*, 16 *Id.*, 189; *Jackson v. King*, 4 *Cow.*, 207-216; 11 *Wheat*, 213, are cited). We feel obliged to yield to the greater force of authority upon the other side of the question, arrayed upon the points for the plaintiff, and drawn from the reports of many States.

4. In addition to the three grounds above noticed, taken upon the printed points of the defendants, another was suggested on the oral argument.

It appears that the grantee of the plaintiff and her husband, after the execution of the deed to him, conveyed in truth to the plaintiff so that as among them, she became the sole owner in fee of the whole premises. It is claimed, that by this, the inchoate right of dower became merged in the greater estate acquired by the last conveyance. But we do not think that this position will avail the defendants in this case. It may be conceded, that ordinarily where two such interests in lands meet in one person, the lesser sinks into the greater. And, as we have above admitted, the fraudulent conveyance from plaintiff and husband, and that back to plaintiff, were valid between the parties to them. But it has been held that this latter rule does not apply to work a merger of a lesser estate in a greater. The force of that rule is, that when one has sought to work wrong, the law will not aid him to

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trace back, when he seeks to reach again the property. But when both he and his conspirator have lost the property conveyed, and the deed has been avoided by the court, and the property restored for the benefit of creditors, the further penalty will not be inflicted of the loss of another interest upon the ground of a merger (*Roberts v. Jackson*, 1 *Wend.*, 478).

For these reasons, the judgment appealed from should be reversed, and a new trial ordered, with costs to abide the event of the action.

GROVER, J., dissented, upon the ground that all claim of the plaintiff of title to the land or of any interest therein, whether as dower or otherwise, was cut off by the judgment under which the defendant acquired title. That being a party to the action, she was bound to set up any defense she had to the relief demanded by the plaintiff therein, which was a sale of the land for the purpose of paying the debts of the grantor. Whether such defense was a bar to the entire action by showing a valid title to the whole land as against the claim made by the plaintiff, or partial only by showing title to part, or some lien or claim thereto, contingent or otherwise, not subject to the claim of the plaintiff. That *Lewis v. Smith* (5 *Seld.* 502), was not applicable to the facts of this case.

HAVEMEYER *against* INGERSOLL.

*Supreme Court, First District ; Special Term, October,
1871*

EXAMINATION OF PARTIES.—MOTIONS.

The court will not determine that a statute on which the plaintiff's right to maintain the action depends, is unconstitutional, upon the hearing of a motion on affidavits.

It seems, that an examination of the adverse party, and a discovery and inspection of his books and papers, cannot be had in one proceeding; and the provisions of section 388 of the Code relating to the latter object, cannot be invoked to sustain an order for the former object.

Under Rule 21 of 1871, the court may grant an order for the examination of defendant, to enable plaintiff to prepare his complaint.*

It is competent for the judges in convention to make rules altering the practice previously settled by decisions of the courts.

Order to show cause cause why an order for defendant's examination should not be vacated.

This cause was entitled as follows :

“ William F. Havemeyer, a resident of the city of New York, and assessed to pay taxes therein, and who pays taxes therein, who sues for himself and all others similarly situated, plaintiff, against James H. Ingersoll, the mayor, aldermen and commonalty of the city of New York, and the board of supervisors of the county of New York, defendants.”

The summons was for relief. The plaintiff applied to the court upon the summons and his own affidavit,

* To similar effect, is *Hadley v. Fowler*, *Ante*, p. 244.

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for an order requiring defendant to appear and be examined. The allegations of the affidavit were as follows:

"William F. Havemeyer, of said city, being duly sworn, says that he is plaintiff in above-entitled action. That said action has been commenced by the service of a summons on the defendant Ingersoll, and by attempts, so far in vain, to serve the same on the other defendants. That in order to prepare the complaint herein properly, correctly, and advisedly, as deponent is advised by his counsel, it is essential that the plaintiff should have an examination of the defendant Ingersoll, under section 391 of the Code of Procedure, and, also, the production, upon such examination, of the defendant Ingersoll's books of account.

"That deponent brings this action in the capacity stated in the above caption, for the purpose of recovering, or having recovered from the defendant Ingersoll, for the benefit of the citizens and tax-payers of the city and county of New York, nearly six millions of dollars, which deponent is informed and believes said Ingersoll, during the years 1869 and 1870, fraudulently obtained and received from and out of the public treasury of said city and county of New York, and which the other defendants, as deponent is informed and believes, willfully and collusively, neglect and omit to take any steps to recover back.

"Said Ingersoll, as deponent is informed and believes, obtained and received such moneys, the precise amount whereof deponent is not aware, but at least five million dollars, and the precise amount whereof can be obtained from the said Ingersoll and from his books, if produced, under the sham and pretense of furnishing or having furnished said city and county with furniture for the courts of the county to the amount of nearly one million five hundred thousand dollars, whereas, in fact and reality, as deponent is in-

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formed and believes, the value of all the furniture in the county court house does not exceed one hundred thousand dollars ; and, under the further sham and pretense of performing or having performed carpenter and cabinet work for said county courts, to the amount and value of over one million two hundred thousand dollars, whereas, in fact and reality, the value of all carpenter and cabinet work done by or for him in said county court does not, as deponent is informed and believes, exceed one hundred thousand dollars ; and under the further sham and pretense of repairing armories and drill rooms, or of armories and drill rooms having been repaired, at a necessary expense of over one million four hundred thousand dollars, whereas, in fact and reality, as deponent is informed and believes, one hundred thousand dollars' worth of work has not been done in making repairs ; and, also, under various other shams and pretenses. That, as deponent is advised, it is impossible, without an examination of said Ingersoll, to get at the exact amount of work done, material supplied, and time necessarily expended, and the exact amount paid therefor ; or to ascertain if other furniture has been supplied besides that now in the county court house, when it was supplied, what was its character, whether household or otherwise, and when it was taken from said court house, or from its place of manufacture. That the same difficulty exists in relation to repairs, materials, carpets, shades, curtains and all such other items as are embraced in the charges for which Ingersoll received the sums aforesaid. That deponent is also informed and believes that said Ingereoll obtained and received such moneys, in manner aforesaid, in combination and collusion with officers of the city and county governments, who shared with him the amounts so fraudulently obtained and received, but that the exact facts as to the names of such persons, the amounts they so received,

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and when they so received them, are not in deponent's possession, and can only be obtained by an examination of said Ingersoll, and that such examination, as deponent is advised, is essential to a proper preparation of the complaint herein, and to enable deponent to bring in proper and additional parties defendant, and to make the charges definitely, specifically and clearly, as to all concerned."

The order was made by a justice of the court, in the following form :

[*Title of the cause.*]

"It appearing to me from the affidavit of the plaintiff that an examination of the defendant, Ingersoll, under section 391 of the Code, is necessary to enable the plaintiff properly to prepare the complaint herein, on motion of plaintiff's attorney, it is ordered that the defendant, James H. Ingersoll, be and appear before me or before such justice of this court as shall hold the chambers, on October 7, 1871, at ten o'clock of that day, in the chambers of the supreme court, in the new county court house, in the city of New York, then and there before me or before the justice holding such chambers, to be examined by the plaintiff herein, touching the matter in this controversy."

[*Signature and date.*]

The defendant, upon the deposition of Richard O'Gorman, corporation counsel, and affidavits of the clerks to the board of supervisors and to the common council respectively, obtained an order to show cause why the order should not be vacated.

William Fullerton, John H. Strahan and Elihu Root, for the motion.

George C. Barrett, and Miller, Stoutenburgh & Peckham, opposed.

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INGRAHAM, P. J.—In the case of *Foley v. Mayor, &c.*, Justice BARNARD decided that the plaintiff had a standing in court, and could maintain the action, as a tax-payer, in behalf of himself and others who should come in as plaintiffs, but did not decide the question as to the constitutionality of section 3 of the act of 1864, chapter 405.

I concur with him that such question should not be adjudicated on a motion similar to the present, nor should it ever be done on ordinary motions affecting questions of practice, unless it has been passed upon by a court in a more formal manner, or the invalidity of the act is beyond doubt.

The decision made by Judge SUTHERLAND in the case of *Pullman* is at variance with the decision of other judges on similar questions, and there should be a decision of the general term before any controlling authority on that subject can be insisted on. I shall, therefore, on that point, follow the ruling in the case of *Foley* as more directly in point than any other in this district, and will not pass upon the constitutional question on this motion. Later decisions of the court of appeals have left this question to be a doubtful one ; but, is it proper on a motion arising on questions of practice to inquire whether the plaintiff can or cannot make out a good cause of action, before the complaint is served, or before it is known upon what grounds the action is based ? The attempt on the part of the defendant to show that the plaintiff must fail in his action because he is unable to prove the negligence of the defendants, or any of them, to prosecute for the alleged frauds, may be a good defense on demurrer or on the trial ; but whether it be so or not cannot be tried on affidavit. The only question to be inquired into on this motion is a mere question of practice, depending on the construction of sections 388 and 391 of the Code, and on rule 21 of the court. Sections 388 and 391 re-

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late to entirely different subjects and cannot be united together for the purpose of aiding proceedings under either.

Section 388 is intended to provide for the discovery of books or papers in the possession of the opposite party, and section 391 is intended to prescribe the mode of examining a party. The latter is the only section applicable to this proceeding. The general term of this district held in *Bell v. Richmond* (4 *Abb. Pr. N. S.*, 44; *S. C.*, 50 *Barb.*, 571), that such examination could only be had after issue joined, and that decision would control this application, unless the provisions of rule 21 should be considered as altering the practice in this respect. This rule prescribes what the affidavit on which the examination is applied for should contain. In case a discovery is sought to prove his complaint or answer, it must disclose the nature of the discovery, and how it is material therefor; and in like manner if the object is to prove the case after issue.

It is apparent from the provisions of this rule that the judges, in framing it, contemplated both cases as properly included in section 391, viz: the right of an examination to frame a pleading or prove the case. The right to examine a party for either purpose, must, therefore, be conceded to be intended in framing this rule, and I am bound by its provisions, as it was made long after the decision in 50 *Barb.* was promulgated.

The only remaining question, is whether the judges in convention had the power to make such a rule which would be in conflict with the previous decisions of the courts.

The authority for this convention is contained in the act relating to the supreme court (*Laws of 1870*, p. 947, ch. 408), which provides for the meeting of the judges, and adds: "Such convention shall revise, alter, abolish and make rules, which shall be binding upon all courts of record, so far as they may be ap-

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plicable to the practice thereof." There can be but little doubt that this provision is sufficient to give full power to make such a rule, and to extend the provisions of section 391 to such a case as the present, even if it had previously been limited by the courts to an examination after issue joined. After the Code had provided for the examination of parties before trial, it became a matter of practice to regulate the time and mode of examination. The rule under consideration was intended for that purpose, and is binding on the courts.

This application to examine the defendant must, therefore, be granted.

As the questions are new, and some of them are proper for the consideration of the general term, and as the next general term will be held in a short time, if the defendant wishes to appeal from this order, a stay of proceedings may be had, provided he appeals in season to have the case noticed for the next term.

The examination of the defendant is ordered, and the motion to vacate the order, therefore, is denied.

Sec 14 Art. 1
183, 4 J. & C. 583

COCKEY *against* HURD.

New York Superior Court; Special Term, May, 1872.

EXAMINATION OF PARTY FOR MOTION.

The provision of section 401 of the Code of Procedure,—authorizing the court to appoint a referee to take, for purposes of a motion, the

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affidavit of any person who refuses to make an affidavit,—applies only to persons not parties to the action.

The case of *Hodgkin v. Pacific Railroad Co.* (5 *Abb. Pr. N. S.*, 73), approved.*

Order to show cause why an order should not be vacated.

Elizabeth A. Cockey and others brought this action against Frederick N. Hurd; and after issue joined, defendant moved for leave to serve an amended and supplemental answer.

Pending the motion, plaintiff obtained an order under section 401 of the Code of Procedure (subd. 7), appointing a referee to take the affidavit or deposition of the defendant, to be used in opposition to such motion.

Thereupon defendant obtained an order requiring plaintiff to show cause why the order of reference should not be vacated.

S. B. Brownell, for plaintiff, in support of the order.

C. C. Bigelow, for defendant, opposed.

CURTIS, J.—This is an application on the part of the defendant to set aside an order of reference granted herein, to take defendant's affidavit, under section 401 of the Code of Procedure. The Code provides, that where any party intends to make or oppose a motion in any court of record, and it shall be necessary for him to have the affidavit of *any person* who shall have refused to make the same, such court may, by order, appoint a referee to take the affidavit or deposition of such person.

It is urged by the defendant that the words *any*

* That decision has since been affirmed on appeal. Reported in 3 *Daly*, 70.

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person, in subdivision 7 of section 401, do not embrace the parties, or either of them, to a suit, and that it was not intended to apply to them. Section 389 of the Code is cited as expressly limiting the examination of a party, except as prescribed in chapter 6 of the Code. The plaintiff claims that subdivision 7 of section 401, was added by the legislature in 1862, and has the effect of removing the restriction, if any, in section 389, and that it was the intention of the legislature to remove all barriers in the way of taking the depositions of parties as well as witnesses, thus giving effect to the prevailing public sentiment in favor of removing every restriction. I think if the legislature had intended that the affidavits of parties might be taken in this manner, they would have clearly expressed it, and so so far modified the restriction in section 389, that it would not apply. While the right to examine an adverse party in respect to the issues in an action is given, it seems rather to be the intention of the legislature, and very justly, that it should be confined to that, and not extended to motions arising in the progress of a cause. As a matter of public policy, it might be a serious question how far a party should be subjected to be examined upon every motion that might be made in a cause, for the purpose of procuring his deposition or affidavit.

The views expressed by the learned judge in *Hodgkins v. Pacific Railroad Co.* (5 *Abb. Pr. N. S.*, 73), appear to present the true interpretation of this section, and in accordance with the decision in that case, the motion of the defendant herein, to vacate the order of reference granted to take the defendant's affidavit, should be granted, but without costs to either party.

Order accordingly

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**BAULEC' *against* THE NEW YORK & HARLEM
RAILROAD COMPANY**

*Supreme Court, Third Department; General Term,
May, 1872.*

**EVIDENCE.—NEGLIGENCE.—LIABILITY OF MASTER
FOR NEGLIGENT SERVANT.**

In an action against a railroad company for damages caused by an accident on defendant's road, arising from a misplaced switch, where the person injured was a servant of the company's, and the ground of recovery was, that the regular switchman was known to the company to be an incompetent person,—*Held*, that it was error to reject evidence to show that it was probable that on the occasion of the accident, the switch had been changed by some person other than the regular switchman, and in his absence.

There is no rule of law requiring intelligent men, of good habits, who are engineers, brakemen or switchmen on railroads, to be discharged for the first error or act of negligence which they commit, or making railroad companies liable for their second error or negligent act to all other servants of such companies, who may sustain damages by reason of such second error or negligent act.

Where, in an action for damage sustained by a servant of a railroad company, by the negligence of a fellow-servant in misplacing a switch, it appeared that a misplacing of a switch by the same switchman had caused an accident on a former occasion,—*Held*, that the company should have been allowed to prove, that on the occasion of the former accident, they had caused an investigation to be made by one of their road masters, who reported that the switchman was free from negligence.

Appeal from a judgment.

Mary Baulec, as administratrix of Thomas Hammond, deceased, sued the New York & Harlem Railroad Company in the supreme court, for negligence, in causing the death of her intestate.

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At the time of his death, the deceased was in the defendants' employ, and the accident which caused his death was due to the negligence of another servant of the company in misplacing a switch. This servant (McGerty), it was claimed by the plaintiff, was known to defendants as a negligent person, whose carelessness had caused a former accident. The facts are stated in the opinion.

Plaintiff had a verdict for three thousand dollars, and defendants' motion on the judge's minutes for a new trial was denied.

From the judgment entered on the verdict, and from the order refusing a new trial, defendant appealed to the court at general term.

Aldace F. Walker, for defendants, appellants.

Esek Cowen, for plaintiff, respondent.

BY THE COURT.—BALCOM, J.—The verdict in this action was recovered by the plaintiff on the ground that Hammond lost his life by the negligence of a switch tender, whom the defendants retained in their employment after they knew he was careless and incompetent for such service. Was the evidence sufficient to sustain this proposition? Or did the judge who presided on the trial, make any erroneous ruling to the prejudice of defendants? The locomotive on which Hammond was fireman, was running towards New York city, on the defendant's railroad, and was thrown from the track of that road, at about half past eight o'clock in the evening, in Westchester county, where the New York & New Haven Railroad unites with that track going towards New York city. The locomotive was tipped over, and Hammond was killed. The switch, at the junction of the two railroads, was set right for trains running on the New York & New

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Haven road ; but the signal there, to show the approaching engineers the situation of the switch, indicated that the switch was set so that trains on the defendants' road could pass the junction. And the engineer, being deceived by the signal, did not stop his train, and his locomotive was thrown off the track by the switch being wrongly set, and Hammond was killed. The evidence was sufficient to justify the inference that the switch was wrongly placed by Patrick McGerty, who had charge of it ; but the judge rejected the defendants' offer to show that it was probable that the switch had been changed by somebody else in the absence of McGerty. To that ruling the defendants' counsel excepted.

I am of the opinion the learned judge erred in rejecting that offer. It is clear that the action cannot be sustained unless Hammond was killed by reason of the carelessness of McGerty. The case was tried on that theory ; and by the plaintiff's endeavoring to prove, and proving to the satisfaction of the judge and jury, that the defendants were guilty of negligence and wrong by keeping McGerty in their employ, as switch tender at that switch, after an accident there that occurred previous to the killing of Hammond. It was, therefore, material for the defendants to prove that McGerty was free from the alleged negligence, that caused Hammond's death. He might not have been careless if the switch was changed by some other person after he had set it right for trains on the defendant's road.

The ground for charging the defendants with wrong by keeping or having McGerty in their service as a switchman when Hammond was killed, consisted in the fact that six or seven months before that time, while McGerty had charge of the switch where Hammond lost his life, a locomotive that was drawing a freight train from New Haven towards New York city, ran off the track there one night, in consequence of

McGerty misplacing this switch. The switch and signal there had been rightly placed by McGerty, before that train had come in sight of him. When he saw it approaching, he thought it was on the defendant's track, and therefore he changed the switch to that track ; when he discovered that such train was coming on the New York & New Haven track, it was too late for him to change the switch back to that track, and the locomotive hitched to that train, ran off the track, at the switch, a distance of about the length of one of the iron rails there. That train was going slowly, and very little damage was done by the locomotive that was drawing it running off the track. There was evidence that trains on the New Haven & New York road usually stopped before passing that switch, and that McGerty supposed the last mentioned train was on the defendant's track, because it did not stop, and, therefore, he changed the switch to that track. There was also evidence that the engineers on such trains generally blew the whistles on their locomotives when approaching that switch, which was not done on the locomotive that ran off while drawing the train from New Haven.

McGerty was sworn as a witness for the plaintiff, on the trial of this action, and testified that he had been in the defendants' service eight or nine years ; that he had been familiar with the switch and junction of the two railroads where the occurrence in question happened, since the junction was put there ; that he had had charge of this switch between nineteen and twenty months before Hammond was killed ; that he had been away from the switch more than a year, at work repairing defendant's road, as a track laborer ; but had been back tending this switch nine or ten months immediately preceding the killing of Hammond. McGerty had previously been a switchman at another place on defendant's road, about five months.

There was nothing in McGerty's evidence, or that

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given by any other witness, to show that he was not a laborer of ordinary intelligence; or that his habits were not good; or that he was not attentive to his duties, and industrious. And I am not prepared to say that the evidence was sufficient to establish that the defendants were guilty of negligence, for keeping McGerty in their employ as a switch tender, where Hammond was killed, after the first accident at that place, which occurred six or seven months before that time. I do not think intelligent men of good habits, who are engineers, or brakemen, or switchmen on railroads, must invariably be discharged by the companies in whose employment they are, for the first error or act of negligence such employees commit, or that such companies will be liable for their second error or negligent act to all other servants of such companies, when the latter sustain damages by reason of such a second error or negligent act. If such a rule is to be established by the courts, the situations of employees on railroads will be very precarious; and no railroad company can safely retain an employee in their service after he has committed a single error, or act of negligence, however honest or intelligent or faithful he may be, or however good his habits are. I cannot subscribe to such a rule, for the reason that it would be unjust and impolitic. But I will not say that under certain circumstances a single careless act may not evince such incompetency or recklessness in an employee as to call for his immediate dismissal by his employer.

The defendants called Artemus W. Eggleston as a witness, who had charge of their railroad track, placed switches, and employed their switch tenders. He testified that he had known McGerty twelve years, during which time he had been "in the employment of the defendants in different capacities," and "ever since he was a young man." That neither he nor the defendants ever knew anything against McGerty, ex-

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cept these two accidents, in regard to his capability for the position of switchman ; that after the first accident he saw McGerty ; got what facts he could of him respecting it ; made inquiries touching it ; looked over the ground where it occurred, and reported respecting it to defendants' superintendent, who told him to retain McGerty. The defendants offered to show that from Eggleston's investigation he was satisfied that where the first accident happened the New Haven did not stop, and so reported ; which offer was objected to, and the judge excluded it. To which ruling the defendants' counsel excepted. The defendants' counsel offered to show that Eggleston reported to the company that he found McGerty free from negligence respecting the first accident. The judge rejected it, and the defendants' counsel excepted.

I am of the opinion the learned judge erred in rejecting these two offers of the defendants. The evidence that was rejected might have shown, if it had been received, that the defendants' superintendent had information that justified him, or at the least that tended to justify him, in directing Eggleston to retain McGerty in the defendants' service as a switchman. It might have established, or have tended to establish, that the defendants were not guilty of negligence in keeping McGerty in their service as a switchman where Hammond was killed, down to the time of that occurrence. And I hold, if that evidence had been received, it might, with the other evidence in the case, have satisfactorily established that the defendants were not guilty of any culpable negligence in retaining McGerty in their service as switchman where Hammond was killed, and that the plaintiff could not maintain this action. We have the right, on review, to assume that the evidence offered would have been given ; and the test is, if such evidence had been received, would it have been material ? If so, its rejection is an error.

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This conclusion or holding is not in conflict with the rule that a master who knowingly employs an incompetent servant, or keeps such an one in his service after notice of his incompetency, is liable for damages resulting from his negligence, to other servants employed in the same business. This rule is applicable when a switchman is a habitual drunkard, and such fact is known, or ought to be known to the corporation, and the injury results from his intoxication (*Gilman v. Eastern Railroad Corporation*, 10 *Allen*, 233). In *Keegan v. Western R. R. Co.*, 8 *N. Y.* [4 *Seld.*], 175, the boiler was defective and dangerous, and its condition in that respect was, and had for some time been known to the defendants by the reports of the engineer, made on five or six different occasions, which were entered on the books of the defendants kept for that purpose. And the defendants were held liable for damages that one of their servants sustained by the explosion of the boiler. The rule was laid down in *Ryan v. Fowler* (24 *N. Y.*, 410), "that the principal is responsible for injuries to his employees from his personal negligence or misfeasance" (See *McMillan v. Saratoga & Washington R. R. Co.*, 20 *Barb.*, 449; *Wright v. N. Y. Central R. R. Co.*, 25 *N. Y.* 562).

All that the defendants were bound to do, after the first accident happened at the switch in charge of McGerty, so far as Hammond's rights were concerned, was to exercise ordinary care and diligence in investigating as to the cause of that accident, and the carelessness and competency of McGerty; and if, by such an investigation, the facts ascertained were such as would justify a competent railroad superintendent in retaining McGerty in the capacity of switch tender, the defendants were not guilty of culpable negligence in this case.

There are other questions in the case which I have not examined.

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For the reasons I have assigned, I am of the opinion that the order denying the defendants' motion for a new trial and the judgment in the action should be reversed, and a new trial granted. Costs to abide the event.

WALLKILL VALLEY RAILROAD COMPANY
against NORTON.

*Supreme Court, Third District; Special Term,
May, 1872.*

APPOINTMENT OF COMMISSIONERS OF APPRAISAL UNDER
GENERAL RAILROAD ACT.

Before commissioners of appraisal can be appointed, under the general railroad act, fifteen days' notice of the time and place when and where the map and profile of the road has been filed must be given to the owners or occupants of the land to be taken.*

Motion for appointment of commissioners of appraisal under general railroad act.

Mr. *Fiero*, for the motion.

Mr. *Hale*, opposed.

LEONARD, J.—The petitioners apply under the general railroad act for the appointment of commissioners to appraise the compensation to be made for certain real estate proposed to be taken by them. They set forth in their petition, among other things, that the real estate described therein is required for the purpose of constructing or operating the road, and that they have not been able to acquire title to it by reason of their being unable to agree with the owners upon the amount of compensation.

* As to the requisites of the map and profile, see N. Y. & Boston R. R. Co. v. Goodwin, p. 21 of this vol.

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In opposition, the defendant Norton, the owner of the land, shows by the affidavits of two persons who are actual occupants of a portion of the said land, and by his own affidavit, that no written notice of the time and place when and where the map and profile of the road was filed has been given to said owner or to said occupants.

The affidavit of said Norton also sets forth certain proceedings for a change of route, to which it is not necessary to refer at any length, in the view which I take of the case.

In the case of Rensselaar & Saratoga R. R. Co. v. Davis (43 *N. Y.*, 137), the court of appeals held that the legislature had not delegated to the railroad company the power to determine the necessity of the appropriation of private property for corporate purposes; that it has constituted the court a tribunal to hear and determine in the premises; that the matter was one of judicial cognizance; and that in respect to it the court exercised a judicial and not a ministerial function. This decision was made on a case arising under ch. 327 of the *Laws of 1869*, which extends the right of taking property to cases other than those mentioned in the general act. But the proceedings are the same as in other cases, and the decision of the court is based on the language of the general act.

It follows then from that decision, as well as from the plain language of the general railroad act, that the determination of the board of directors of a company is not conclusive as to the necessity of an appropriation of land under the right of eminent domain; but that the court is to hear proofs and is to decide whether it is necessary for the company to appropriate the land described.

In the present case the petition states that the land is required for the purpose of constructing or operating the road. and it is plain that this land is for the roadway.

Whether this land is necessary depends on the decision of the question whether or not the route of the railroad is to be on this land.

Now the statute provides very clearly and plainly for the establishing of the route of a railroad. It does not give an absolute authority to the company to designate its route. The company is to make a map and profile of the route "*intended* to be adopted," and are to file the map and profile in the county clerk's office. They are then to give written notice to all actual occupants of the time and place of filing, and that the route designated passes over the land of such occupant.

Within fifteen days after receiving such notice any owner or occupant may give ten days' notice and apply to a justice of the supreme court for commissioners to examine the route.

These commissioners are either to affirm the route originally designated, or to adopt the proposed alteration. And on appeal from the decision of the commissioners, the general term may either affirm the route proposed by the company, or adopt that proposed by the petitioner (*Laws of 1871*, ch. 560). Thus it appeared that, as is said by the court of appeals in matter of the Long Island Railroad Co. (45 *N. Y.*, 364): "The location of the route is in its nature a proceeding preliminary to the acquisition of land therefor, by appraisal and condemnation, and the statute regulations must be complied with before the route can be located. The filing of the profile and map required by that section, *is not the location of the route*, but the proposal of one which may or may not become the actual route as shall be determined by the subsequent proceedings."

This appears to be conclusive against the present application. No notice has been given to the actual occupants. It will be, at the least, fifteen days after such notice before it can be known whether the land

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described will become the actual route. At present, there is no more right to appropriate this piece of land described in the petition, than there is to appropriate any other piece of land in the county.

All that can be said is, that if the route should finally be established over this land, then it will be needed; if elsewhere, it will not. Meantime, it is impossible to say that the land is required for the construction of the road.

Motion denied, with ten dollars costs.

SCHOFIELD *against* WHITELEGGE.

Court of Appeals; 1872.

PLEADING.—COMPLAINT FOR WRONGFUL DETENTION OF CHATTELS.

In an action to recover the possession of personal property wrongfully detained, the complaint must allege a general or special ownership in the plaintiff.

Appeal from a judgment.

Cyrus Schofield sued James H. Whitelegge in the New York superior court, to recover the possession of personal property.

The allegations of the complaint were as follows:

“The above-named plaintiff, for a complaint in this action, alleges that the above-named defendant has become possessed of and wrongfully detains from this plaintiff, the following property, that is to say: one rosewood Ernest Gabler piano, No. 6604 (Ernest Gabler, maker), of the value of four hundred dollars.

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Wherefore the plaintiff demands judgment against the said defendant for a return, and for damages," &c.

The answer was a specific denial.

At the trial, the complaint was dismissed, as not stating facts sufficient to constitute a cause of action.

Plaintiff appealed to the court at general term, where the judgment of dismissal was affirmed (reported in 10 *Abb. Pr. N. S.*, 104). Plaintiff appealed to the court of appeals.

Oscar Frisbie, for the plaintiff, appellant.

A. H. Reavy, for the defendant, respondent.

FOLGER, J.—The complaint in this action does not, in terms, show any right or title in the plaintiff, upon which the former action of replevin would lie. That action could be maintained only by one who had the general or a special property in the thing taken or detained. That property must have been averred in the declaration, or it would not have sufficed the plaintiff's purpose (*Pattison v. Adams*, 7 *Hill*, 126. See also *Bond v. Mitchell*, 3 *Barb.*, 304; *Vanderburgh v. Valkenburgh*, 8 *Id.*, 217).

The chapter of the Code of Procedure, of "The Claim and Delivery of Personal Property," was intended to supply the provisional relief which was theretofore obtained in the action of replevin (See *Commissioners' Report*, p. 169). There was no intention to change the requisites to maintain the action. There was no change made. Indeed, the Code, as reported, expressly required an affidavit from the plaintiff, where a delivery was to be made, that he was the owner of the property, or lawfully entitled to the possession thereof, by virtue of a special property therein (*Commissioners' Report*, p. 170, § 182, subd. 1. And so it now is (*Code*, § 207). Nor is it less necessary now

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than formerly for the plaintiff to aver the facts which constitute his cause of action. He must allege facts and not evidence. He must allege facts and not conclusions of law. The plaintiff here alleges that the defendant wrongfully detains from him the chattel in question. If indeed that be true, then it must be that the plaintiff has a general or special property in the chattel, and the right of immediate possession. But unless he has that general or special property, and right of immediate possession, it cannot be true that it is wrongfully detained from him. The last, the wrongful detention, grows from the first, the property, and the right of possession. The last is the conclusion. The first is the fact, upon which that conclusion is based. It is the fact, which in pleading must be alleged. Where facts are stated in a pleading, which militate with a conclusion of law therein stated, the statement of facts will prevail. *Jones v. Phoenix Bk.*, 8 *N. Y.* [4 *Seld.*], 228; *Robinson v. Stewart*, 10 *Id.* [6 *Seld.*], 189. And is not the statement of a conclusion of law, without a fact averred to sustain it, an immaterial statement?

The plaintiff says that the defendant wrongfully detains from him the piano. The fact involved in that statement is that he detains it. Granted, then, that he detains it, why is it wrongful? Because the plaintiff is the owner by general or special right of property, and entitled to the immediate possession. But these are the facts, which are to be shown. They have not been averred. How then can they be shown? The plaintiff claims, however, that the averment in the answer denying the detention and denying ownership in the plaintiff, puts in issue these facts, and that the defect in the complaint is cured by that averment. He cites *Bate v. Graham* (11 *N. Y.* [1 *Kern.*], 237). But there the allegation in the answer was the affirmation of the very fact, which it was objected the com-

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plaint should have averred. There the omission from the complaint was of an allegation, that the defendant maintained that a certain assignment of an insolvent debtor was not fraudulent. The answer of the defendant made the very averment which was omitted from the complaint, and the omission of which was the ground of the defendant's objection to the complaint. The court well held that the complaint might have been amended, for both parties at the trial were maintaining the same fact. Here, however, the parties do not seek to maintain the same fact; and that which the answer avers, is the direct opposite of that which the plaintiff must establish to recover. Would the plaintiff take the averment of the answer into his complaint as a part of its allegations? Then he would allege that he is not the owner of the property, and that the defendant has not detained it from him. And then his complaint would show him without cause of action (See *Pelton v. Ward*, 3 *Caines*, 73).

The same considerations are applicable to the lack of the averment of a demand and refusal, if the plaintiff's case is to depend upon a wrongful detention, without a wrongful taking in the first instance. The case of *Levin v. Russell* (42 *N. Y.*, 251), is cited by the appellant. There are two facts which make it inapplicable here. There was in it no motion to dismiss the complaint for its insufficiency, and proof was made at the trial, without objection of facts, making a cause of action.

Again; the complaint did not allege that the property was that of the plaintiff. This does not appear in the report of the case in 42 *N. Y.*; and from the statement there, one would think that the complaint was without an allegation of the plaintiff's ownership. On referring to the printed case, as it is found in the series of bound volumes of cases in this court, in the State library, the averment reads thus: "the following goods and chat-

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tels of the plaintiff." This is in exact accordance with the precedent for a declaration in replevin (Pattison v. Adams, *supra*).

The judgment should be affirmed, with costs to the respondent.

FOLGER, J., also read an opinion in favor of affirmance.

All the judges concurred.

BILDERSEE *against* ADEN.

*Supreme Court, First Department, First District;
General Term, 1872.*

UNDERTAKING ON ATTACHMENT.

In an action on a statutory undertaking, a consideration need not be proved.

An undertaking given to procure the discharge of property levied on under an attachment, is not invalidated because the attachment is afterwards set aside on counter-affidavits.

It seems, that it would be otherwise if the attachment were set aside because of the insufficiency of the affidavits on which the attachment was originally obtained.

Appeal from a judgment.

Barnet Bildersee and others sued Joseph Aden and others, in the supreme court, on an undertaking which had been given by the defendants under section 241 of the Code, to procure the release of goods levied on under an attachment issued as a provisional remedy under the Code of Procedure, against the property of one Mrs. Boxius, in a former suit. This attachment

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had, subsequent to the giving of the undertaking, been vacated by Mrs. Boxius, on counter affidavits. Judgment, however, was obtained against her, and this suit brought on the bond.

A decision on demurrer to the complaint is reported in 8 *Abb. Pr. N. S.*, 171.

The decision on the trial, where defendants had judgment of dismissal of the complaint, on the ground that there was no consideration for the undertaking after the attachment was vacated, is reported in 12 *Abb. Pr. N. S.*, 163. From that judgment, plaintiffs appealed to the court at general term.

A. *Blumenstiel*, for the plaintiffs, appellants.—
I. The undertaking provides for the payment of the judgment, if any be rendered, upon demand, without any other contingency. The sureties undertake to pay on demand to the plaintiffs “*any judgment which may be recovered against the defendants in this action not exceeding the above mentioned sum.*” This is, therefore, an absolute undertaking to answer for the debt of another, upon the conditions set out in the instrument itself, to wit: there must be a judgment and a demand. It therefore comes within the statute of frauds, and the undertaking cannot be vitiated by any extrinsic evidence, nor can the intention of the guarantors, as expressed, be altered by parol or extrinsic proof. The undertaking did not provide that it should be void in case the attachment be subsequently discharged on motion; and, therefore, the fact that it was so discharged did not affect our right to recover upon the undertaking. A condition not in the instrument cannot be supplied (1 *Greenl. on Ev.*, §§ 275, 282; 2 *Phil. on Ev.*, 350; 2 *Stark. on Ev.*, 544, 548; 18 *Johns.*, 45; 24 *Wend.*, 419; 8 *Johns.*, 190; 11 *Id.*, 201; 2 *Sandf.*, 202).

II. The undertaking, and the statutes under which

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it was given, are to be construed to sustain the defendant's liability (4 *Hill*, 384 ; 20 *Wend.*, 561 ; 7 *N. Y.* [3 *Seld.*], 97 ; 11 *Id.* [1 *Kern.*], 593, 601).

III. The undertaking was a voluntary instrument. The defendants were not bound to give it. The Code is not peremptory. The defendants might have relied on their motion, and the remedy for damages on the bond or otherwise. The defendants might have given the undertaking, even had no attachment been issued (*Coleman v. Bean*, 3 *Keyes*, 94 ; 32 *How. Pr.*, 370).

IV. The discharge under section 241 is a matter distinct in itself, and not affected by any proceeding not falling within the purview of that provision. The motion to discharge might be made after judgment (15 *Abb. Pr.*, 189 ; *Id.*, 97 ; 24 *How. Pr.*, 286 ; *Bildersee v. Aden*, 8 *Abb. Pr. N. S.*, 171-173).

V. The attachment was not vacated upon a jurisdictional question. I grant that if this attachment had been issued under the non-imprisonment act of 1831, the bond or undertaking would also be void. Because the attachment there is original process, and the dismissal thereof ousts the court of jurisdiction (*Cadwell v. Colgate*, 7 *Barb.*, 253). Again, if this attachment had been vacated upon the papers on which it was granted,—to wit : upon a question of jurisdiction or insufficiency of the affidavit,—then there might be a question whether the undertaking would remain valid.

VI. The court cannot supply an omission made by the legislature in enacting a law, even if it clearly appears that the legislature intended to enact the part omitted, provided there is no ambiguity in the law itself (41 *Barb.*, 450 ; *Drummond v. Hudson*, 14 *N. Y.* [4 *Kern.*], 60). The undertaking under section 241 of the Code is clear and unambiguous, and by no stretch of language or construction can this section or the undertaking be made to read that it shall be void if the attachment is vacated. The instrument is clear

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and absolute on its face, and provides simply for the payment of the judgment, nothing else. The consideration, if any is required, was the release of the goods upon the giving of the undertaking (31 *N. Y.*, 350; 11 *Johns.*, 192; 18 *Id.*, 47; 20 *Wend.*, 562; *Wallace v. Harris*, 7 *N. Y.* [3 *Seld.*], 97; 11 *Id.* [1 *Kern.*], 602).

Cox & Ready, for defendants, respondents.

BY THE COURT.—INGRAHAM, J.—The learned judge before whom this case was tried was in error in holding that any consideration was necessary to uphold an undertaking given on a release of an attachment. The release of the property levied on was a sufficient consideration, if any was necessary; but where the attachment is issued, and an undertaking is given to discharge, under the provisions of the statute, no consideration is necessary either to be inserted thereon or to be proven on the trial. The statute (Code, §§ 240, 241) provides that on application to discharge the attachment, the defendant shall deliver to the court or officer an undertaking, &c. It is a statutory undertaking, for which no consideration is necessary. This has been repeatedly held. In *Thompson v. Blanchard* (3 *N. Y.* [3 *Comst.*], 335) it was held that where a statute required an undertaking to be entered into to give a right of appeal, it was valid, although it did not express a consideration. It was also then said that the statute of frauds only applied to common law agreements, and not to instruments created under special statutes. This case was approved in *Doolittle v. Dininny* (31 *N. Y.*, 350), and *Johnson v. Ackerson* (40 *How. Pr.*, 222). In *Coleman v. Bean* (32 *Id.*, 370) an undertaking purporting to be issued to discharge an attachment was held valid, although no such attachment ever issued.

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It is urged for the respondents that, the attachment having been set aside, the undertaking fell with it, and ceased to be a valid security. It is settled that if the attachment was improperly issued, and is afterwards set aside on that ground, there was no jurisdiction to sustain it, and, where that is the case, the undertaking as well as the attachment is void. This was the case in *Cadwell v. Colgate* (7 *Barb.*, 253), where the affidavit on which the attachment was issued merely stated the belief of the party, and did not authorize the issuing of the attachment. In the present case, the affidavit on which the attachment issued was sufficient to call upon the officer to whom it was presented to exercise his judgment in granting it, and the subsequent proceedings to set it aside did not raise the jurisdictional question. In such cases, the rule, I think, is, that a bond or undertaking remains valid, although the attachment is subsequently set aside, unless the court expressly orders the undertaking also to be canceled. It is only where there is a total want of evidence on some essential point that the officer fails to acquire jurisdiction (*Matter of Faulkner*, 4 *Hill*, 598; *Haggard v. Morgan*, 5 *N. Y.* [1 *Seld.*], 422).

From the cases above cited, it is apparent that the party giving the undertaking could not set up as matter of defense to an action upon the same, that the grounds on which it was issued were not true; the giving of the undertaking concludes the parties on that point. The fact of the setting aside of the attachment upon the same grounds does not alter the character of the defense, and unless the court, when the attachment is vacated, makes the same order as to the undertaking, it is left in force, and such a defense cannot be made to it.

Judgment reversed and new trial ordered, costs to abide event.

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JOSLYN *against* THE PACIFIC MAIL STEAMSHIP COMPANY.*New York Common Pleas ; Special Term, June, 1872.*

INJUNCTION.—REDUCTION OF CORPORATE STOCK.

An injunction at the suit of a stockholder, forbidding a corporation to reduce its capital stock in a mode authorized by law, cannot be sustained, on a mere apprehension that the corporation may become unable to pay its debts, and that the plaintiff's individual liability for such debts will be increased by the reduction.

The intention of the corporation to use its assets to reduce the capital, cannot be shown by affidavits on information and belief.

Where a charter is granted subject to a power reserved by the legislature to amend or repeal it, a subsequent act authorizing the company to reduce the capital, on consent of a certain majority of the stockholders, is not unconstitutional, either as impairing the obligation of a contract, or as altering the character or purpose of the corporation.

Motion to dissolve an injunction.

The facts are stated in the opinion.

E. W. Stoughton and *David Dudley Field*, for the plaintiff.

Homer A. Nelson, for the defendant.

LARREMORE, J. — A temporary injunction was granted in this action, and application is now made for its dissolution.

The defendant was incorporated by an act of the legislature of this State, passed April 12, 1848 "for the purpose of building, equipping, furnishing, fitting,

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purchasing, chartering and owning vessels, &c., to be run and propelled in navigating the Pacific Ocean.

By subsequent acts, the said corporation was authorized to increase its capital stock, and the same was finally increased to twenty million dollars.

On May 11, 1872, an act was passed authorizing a reduction of said capital stock, in the following words:

"The Pacific Mail Steamship Company is hereby authorized to reduce its capital stock to ten million dollars, upon first obtaining the written consent of stockholders owning two-thirds of said capital stock, and to that end may buy in, cancel and extinguish its shares, so far as the same can be purchased at prices not exceeding the par value thereof, and the shares so purchased shall be retired and extinguished in reduction of the capital stock of the company, and shall not be issued again."

The plaintiff, who is a stockholder in said company, alleges that large debts are constantly accruing to the laborers and operatives for service performed for said corporation, amounting to many thousands of dollars in each month.

This is followed by an exhibit showing the resources and liabilities of said company.

The plaintiff then alleges on information and belief, that it is the intention of the officers of said company, and they threaten, to use all the available funds and assets and the proceeds thereof, for the purchase of shares in reduction of said stock, and also to borrow money for that purpose.

Section 9 of said act of incorporation provides, that the stockholders shall be jointly and severally individually liable for all the debts that may be due and owing to all said laborers and operatives for services performed for said corporation.

Section 12 provides that no stockholder shall be personally liable for the payment of any debt con-

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tracted by said corporation, which is not to be paid within one year from the time the debt is contracted, nor unless a suit for the collection of such debt shall be brought against said corporation within one year after the debt shall become due ; nor shall a suit be brought against a stockholder for any debt so contracted unless the same shall be commenced within two years from the time he shall have ceased to be a stockholder; nor until an execution against the corporation shall have been returned unsatisfied in whole or in part.

The plaintiff avers that the result of the reduction of said stock will be to increase the liability of the remaining stockholders created by said section 9, of said act of incorporation; and that the act authorizing said reduction is unconstitutional and void.

The affidavit of Meeteer annexed to the complaint, states that Stockwell, the president of said company, has been for a long time past engaged in making purchases of said stock of the company, and that the affiant has been "informed by a very great number of persons" that said Stockwell has used large sums of money belonging to said company for the purchase of said stock, borrowed stock of the company, and had transferred to his own name, upon the books of the company, a large amount of stock which he had borrowed for that purpose, and that he had borrowed from other sources, through his position as president of said company, large sums of money with which to purchase said stock.

The defendant, in an affidavit read in opposition, denies in positive and unequivocal terms the averments of the plaintiff in reference to the purchase of said stock, or the use of the moneys of said company for that purpose.

Defendant also avers that prior to the issuing of the injunction herein, the written consent of more than two-thirds of the stockholders was obtained, authorizing

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said company to reduce its capital stock to ten million dollars.

That the laborers and operatives of said company are fully paid monthly, and nothing is past due and unpaid for services performed by them.

Annexed to this affidavit and forming a part thereof is an exhibit, showing the resources and liabilities of said company, from which it appears that it has over three million dollars in cash, and property of the value of twenty-one millions one hundred and ninety-seven thousand one hundred and fifty-two dollars and seventy cents, with a net increase in the quarterly earnings for May 1, 1872, above that of May 1, 1871, of four hundred and seventy-two thousand nine hundred and seventy dollars and forty-four cents.

This injunction cannot be sustained on the merits of the case.

The company is solvent and possessed of a large amount of property; the laborers and operatives have been fully paid, and there is nothing in the moving papers upon which to found a reasonable presumption of the present or future inability of said company to discharge its liabilities.

A mere apprehension in this respect is not sufficient to warrant judicial interference.

The allegations as to the intention of defendant to use its assets to reduce the stock, are made on information and belief, and the sources of such information and grounds of belief are not stated.

This alone would be fatal to plaintiff's application (*Campbell v. Morrison*, 7 *Paige*, 157; *Bank of Orleans v. Skinner*, 9 *Id.*, 305; 1 *Barb. Ch.*, 617; *Livingston v. Bank of New York*, 26 *Barb.*, 304; *Roome v. Webb*, 3 *How. Pr.*, 327; *Rateau v. Bernard*, 12 *Id.*, 464; *Crocker v. Baker*, 3 *Abb. Pr.*, 182; *People v. Mayor of New York*, 9 *Id.*, 253).

The equities are denied, and upon that ground the

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defendant is entitled to a dissolution of the injunction (*Finnegan v. Lee*, 18 *How. Pr.*, 186; *Blatchford v. New York & New Haven R. R. Co.*, 5 *Abb. Pr.*, 276).

It is claimed, however, that the act of May 11, 1872, which authorized the reduction of said stock, is unconstitutional and void, for the reason that it impairs the obligation of the contract made by the parties hereto.

In the said act of incorporation, the right at any time to alter or repeal it was expressly reserved to the legislature, and plaintiff's purchase of stock was made subject to the exercise of such right, in such manner as the legislature might deem essential and expedient (*Buffalo & N. Y. City R. R. Co. v. Dudley*, 14 *N. Y.* [4 *Kern.*], 348). Such a reservation is not a repugnant condition, but only a limitation (*McLaren v. Pennington*, 1 *Paige*, 105).

The legislature had the right to modify the original charter, and its action was valid and binding upon the stockholders, unless it appears that such action was contrary to the fundamental law of the State (*Poughkeepsie & Salt Point Plankroad Co. v. Griffin*, 21 *Barb.*, 454).

Such modification or alteration having been assented to by two-thirds of the stockholders, is valid and binding upon those who did not assent (*White v. Syracuse & Utica R. R. Co.*, 14 *Barb.*, 559; see, also, 14 *N. Y.* [*Kern.*], 349, *supra*).

I must assume (in the absence of proof to the contrary) that the directors intend to act within the scope of their authority, and none of the cases recognize the right of the plaintiff to complain, unless he has been injured.

And this leads to the consideration of his cause of action.

He claims, that by reason of the alleged reduction, he will become liable for double the amount of the debts provided for in said section 9 of the charter.

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I cannot see how such a result must necessarily follow the act complained of.

His individual liability for all such debts was fixed prior to the act of May, 1872, and was then, as it is now, subject to the limitations contained in said section 12, and dependent in every case upon the solvency of the company.

His right to claim contribution is in no way impaired, nor (if defendant's exhibit of property is correct) is it ever likely to be enforced.

The act in question merely confers authority upon the company to reduce the stock, if two-thirds of the stockholders consent. To that end, stock may be bought in, "so far as the same can be purchased," and such shares shall be retired and extinguished, and shall not be issued again.

This will operate as a merger of the stock thus retired, and the remaining shareholders represent, and are entitled to, the whole property, in proportion to their respective shares.

Nor can I assume that the assets of the company will be used for the purpose of such reduction.

The time within which it may be done is not limited by the act, but may (for aught that appears), extend throughout the period of said company's corporate existence.

Until proof of violation, the presumption of law is that the directors will not exceed their authority.

They may intend to use the net earnings of the company, or some portion thereof, from time to time, to purchase the stock in question.

I do not think the legislature has exceeded the authority reserved in the charter of incorporation.

The act authorizing the reduction does not make defendant a new company, or change or pervert its original business, as it did in the case of Hartford & New Haven R. R. Co. v. Croswell, 5 Hill, 383.

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The company remains the same in its character, object and business.

No obligation was imposed by the act.

It left it to the company to say whether or not the stock should be reduced.

This has been done in the manner prescribed, and may have been intended ultimately for the benefit of the stockholders.

Upon the papers presented, I think the defendant is entitled to a dissolution of the injunction.

Injunction dissolved.

ALLEN *against* MALCOLM.

New York Common Pleas ; Special Term, March,
1872.

DEMURRER.—PENDENCY OF ANOTHER SUIT.—CLOUD
ON TITLE.—APPEARANCE.—AFFIDAVIT TO
OBTAIN ORDER OF PUBLICATION.

Where, in an action to set aside a mortgage as being a cloud on title, it appears by computation from the facts stated on the face of the complaint, that there is a certain sum due on the mortgage, and the complaint alleges in words that the whole sum due is less than such amount, and alleges a tender of such smaller sum; there is no cause of action alleged, as the allegation of the sum due is a mere allegation of a legal conclusion unwarranted by the premises. However defective may be a defense, it is not liable to demurrer while the pleading which it assumes to answer is radically insufficient to call for any defense whatever.

Where the court has jurisdiction of the subject matter, any defect in the proceeding to bring the defendant into court is waived by his

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voluntarily appearing in the action; unless such appearance is specially to protest against the jurisdiction, or in proceedings instituted to set aside some act of the court or its officers without jurisdiction, and to the prejudice of the party.

In an action to set aside a mortgage as a cloud on title, a defense that in a former action between the same parties, brought for the foreclosure of the mortgage, the plaintiff had appeared and defended, and that an appeal from a judgment in that action was then pending;—*Held*, good on demurrer.

In an affidavit to obtain an order of publication, in a foreclosure suit, *it seems*, that a statement that the defendants are absent and reside in a foreign State, is sufficient to dispense with proof of efforts to find the defendants in this State.

Demurrer to answer.

ROBINSON, J.—The complaint alleges the execution of a mortgage by plaintiff to defendant, dated November 11, 1869, on property in New York city, duly recorded, to secure their bond conditioned for the payment of ninety-five hundred dollars and interest; to wit, forty-five hundred dollars on November 11, 1870, and five thousand dollars on November 11, 1871; that they paid forty-five hundred dollars on December 16, 1871, “on account;” and on November 11, 1871, tendered the defendant (the mortgagee) fifty-nine hundred dollars, as and for the whole balance due “and costs and charges attaching thereto,” and requested a discharge of the record of said mortgage, which being refused, this suit is instituted to remove the cloud upon the title, created by the ostensible lien of the mortgage.

Upon the face of this complaint it appears, the bond was conditioned for the payment of ninety-five hundred dollars and interest from November 11, 1869, by means of which there was due December 16, 1870 (although not yet wholly payable, according to the alleged terms of the bond), that principal sum, and seven hundred and twenty-nine dollars and sixty-five cents interest, making together ten thousand two hundred

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and twenty-nine dollars and sixty-five cents, when, forty-five hundred dollars being paid "on account," there remained due, a balance of five thousand seven hundred and twenty-nine dollars and sixty-five cents, interest on which to November 11, 1871, was three hundred and sixty-two dollars and eight cents, making then due for principal and interest the sum of six thousand and ninety dollars and seventy-three cents, and the alleged tender of fifty-nine hundred dollars then made, was insufficient to satisfy the amount by one hundred and ninety dollars and seventy-three cents.

The averment that fifty-nine hundred dollars "was the whole sum secured to be paid by said mortgage, and all interest thereon and costs and charges attaching thereto," in the absence of any general or particular specification of any other payment of principal or interest, or of any other circumstance by which the apparent amount due had become reduced to the amount, is a mere statement of a legal conclusion, unwarranted by the premises stated. On the face of the complaint, no substantial reason is assigned for calling on the court to decree a satisfaction of the record of the mortgage without payment of the full amount payable according to the terms of the bond, nor does it present facts sufficient to constitute any cause of action. However defective may be any of the defenses, they are not liable to demurrer, while the pleading which they assume to answer is radically insufficient to call for any defense whatever. But second.

From the statements made in the third, fourth and sixth defenses, it is disclosed that these plaintiffs appeared in the action in the supreme court commenced by the present defendant to foreclose the mortgage in question, and made and appeared on repeated motions therein affecting the merits; they first made a motion to vacate a judgment for foreclosure and sale,

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which the plaintiff therein (the present defendant), had irregularly obtained against them on service of summons by order of publication, and service of summons and complaint upon them personally in Connecticut, and on such motion they obtained a decision in their favor, setting aside all the proceedings of the plaintiff therein, *subsequent to the service of the summons*; that they subsequently made a motion in the action for a stay of proceedings (under the provisions of 2 *Rev. Stat.*, 192, § 161), upon their paying the interest on the bond and mortgage, with the costs and disbursements of the plaintiff therein, and for leave to answer the complaint, which motion was denied; that subsequently another decree of foreclosure and sale was made in that action for satisfaction of part of the mortgage debt; and that afterwards a further order or decree was made therein under the provisions of 2 *Rev. Stat.*, 193, § 164, upon the hearing of which these plaintiffs appeared and made opposition; that several appeals taken by the respective parties in that action (parties to the present one), are still pending and undetermined. From these statements it is evident the present plaintiffs (notwithstanding any possible objection which they might have urged against the jurisdiction obtained over them personally, from defect in the affidavit submitted to the court under section 135 of the Code, under which the order of publication was obtained), have nevertheless submitted themselves fully to the jurisdiction of the supreme court in that action, and that their rights are still *sub judice*, either in that court or upon the appeals taken from its order, still pending and undetermined.

That court had jurisdiction of the subject matter (foreclosure of a mortgage on real estate in the city of New York), and any defect in the proceeding, to bring the plaintiffs into court, was waived by their voluntary appearance in the action (*Mahaney v. Penman*, 1 *Abb. Pr.*, 34; *Higgins v. Rockwell*, 2 *Duer*, 650; *Ballard v.*

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Burrowes, 2 *Robt.*, 206). Such appearance was not specially to protest against the jurisdiction nor in proceedings instituted to vacate or set aside any order, judgment or service of process or any other action of the court or its officers to their prejudice, had or taken in the absence of such jurisdiction (*Malcolm v. Rogers*, 1 *Cow.*, 1; *Seymour v. Judd*, 2 *N. Y.* [2 *Comst.*], 464); but their appearances before the court were in matters involving the *merits* of the controversy, and constituted a complete submission to its general jurisdiction (*Cooley v. Lawrence*, 5 *Duer*, 605-610; *Sullivan v. Frazee*, 4 *Robt.*, 16, 621).

As to the fifth defense, were it not that the complaint stated no facts sufficient to constitute a cause of action, it would constitute no defense to a proper action to remove a cloud upon the title, for the reason assigned, that after a tender by the mortgagor of the amount due and suit brought he had conveyed away the land with full covenants of warranty. The right of action in said case was complete when the action was commenced; he remained after conveyance with such covenants the primary party in interest, in the removal of the cloud on the title. The objection, at most, was one referring to the necessity of bringing in the grantee as a party proper to a complete determination of the controversy rather than *as a bar* or matter of complete defense, especially as it occurred after suit brought and before answer.

Under these views I do not consider it necessary to discuss the question as to the sufficiency of the affidavit presented in the foreclosure suit, and upon which the order for publication as against these plaintiffs (defendants therein) was granted, or whether it contained sufficient proof to confer upon the court jurisdiction to grant that order.

Though it failed to state what ineffectual efforts had been made within this State to serve the summons, it

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nevertheless showed that the defendants (plaintiffs in this action), *were absent and resided in the State of Connecticut*, and it may well be questioned whether *absence* did not excuse any such futile "efforts," and whether this objection under the proof presented is jurisdictional, or at most, matter of irregularity that ought to have been objected to and corrected in the action (*Peak v. Cook*, 41 *Barb.*, 517; *Wells v. Thornton*, 45 *Id.*, 390; *Waffle v. Goble*, 53 *Id.*, 517).

The several demurrers to the several defenses, however, for the reasons above stated, are overruled, and judgment ordered for the defendant.

CREVIER *against* THE MAYOR, &c. OF NEW YORK.

New York Common Pleas; Special Term, February, 1872.

INJUNCTION AGAINST TAX OR ASSESSMENT.—CLOUD ON TITLE.—DEFECT IN RECORD.—MULTIPLICITY OF SUITS.

The equitable powers of a court can not be invoked by one alleging that he is injured by the imposition of a public tax or assessment affecting the title to his property, when the party claiming under such tax or assessment will be required to show its entire regularity, and the alleged irregularity or error is such that it must be disclosed, by the record of the proceedings when so produced, or in the course of the proofs necessary to be adduced to show the existence and due exercise of the power to impose the tax.*

* Some confusion in the cases has arisen from the fact that the question whether the defect will appear upon the record or not, may turn

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The exceptional cases in which a court of equity will interfere, are, first, where the proceeding in the subordinate tribunal will necessarily lead to a multiplicity of suits; second, where, otherwise, there will be committed an irreparable injury; and, third, where the title to be derived under it is *prima facie* valid by force of the instrument or proceeding sought to be enjoined or set aside, and extrinsic facts are necessary to be proved, in order to establish its invalidity or illegality.

The objection of a multiplicity of suits must be one to which the plaintiff will be subject, and of which he may complain. A person liable in respect to a proceeding which may create a lien or cloud on the title of his separate property, cannot sue, because there are others whose property may be similarly affected.

A motion for an injunction to prevent the imposition of an assessment in New York City, by one who applied, as well on behalf of himself as of all other property owners affected thereby, was denied, where it appeared that no irreparable injury would be done, and the alleged irregularities might be examined in a suit at law.

Motion to continue an injunction.

The action was brought by Julien Crevier, Jr., upon facts which are stated in the opinion.

Charles E. Miller, for the motion.

Richard O'Gorman, opposed.

ROBINSON, J.—The present application is to continue and make absolute a preliminary injunction, restraining the corporation, their board of assessors, and

on the language of the statute regulating the proceedings, and sometimes depends on a nice question of construction. *Howell v. City of Buffalo*, alluded to in *Hatch v. The Same* (38 N. Y., 280), was a case of that character. The injunction was there denied, because the court were of opinion, that under the peculiar language of the statute relating to the city of Buffalo, the certificate of sale would necessarily show the defect of jurisdiction. Thus understood, the case of *Howell* does not impugn the general rule as to the facts necessary to sustain an action to remove a cloud on title of this character.

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of revision and correction, from proceeding to act upon and lay an assessment for paving the Seventh-avenue from Fourteenth to Fifty-ninth-street, with a wood pavement, known as the Stafford pavement. The action is brought by the plaintiff, as owner of lands fronting on Seventh-avenue, to be affected by such assessment, on his own behalf, as well as on behalf of all others in like interest.

Previous to 1868, the Seventh-avenue had been paved with cobble stones, and the crosswalks laid and sidewalks extended to the width required by law. On March 10, 1868, an ordinance was duly passed by both boards of the common council, over the veto of the mayor, authorizing the Croton Aqueduct Department to advertise for bids, and contract for the paving of the avenue with the Stafford pavement, except such parts as were already paved with Belgian pavement, and also laying and relaying crosswalks at the intersecting streets, and that a contract be awarded therefor, provided the expense did not exceed five dollars per square yard. On December 22, 1869, this ordinance was amended by a resolution passed by both boards and approved of by the mayor, "that inasmuch as rock must be excavated upon the surface of said avenue, to enable the said pavement to be laid, the price for such pavement shall not exceed the sum of six dollars and fifty cents per square yard, which shall cover the cost of laying the pavement and of removing such rock." And the Croton Aqueduct Department were authorized and directed to advertise for bids, and contract accordingly. Under such resolutions, a contract, dated February 23, 1870, was made by the Croton Aqueduct Board, for the performance of the work at six dollars and fifty cents per square yard for the pavement, *one dollar and forty cents per square foot for the new bridge-stones, and thirty-five cents per square yard for relaying the (then) present bridge-stones, and*

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the contractor *was also* to be allowed *all the old materials, cobble-stones, &c.*, except sewer man-hole heads. and the frames and heads to Croton or gas stop-cocks. The contractor proceeded and laid the pavement, except that portion occupied by the rails of the double track of the Broadway & Seventh-avenue Railroad Company, laid through the whole of Seventh-avenue, below Fifty-ninth-street, as authorized by chapter 513 of the *Laws of 1860*, and the space between the rails of each track traveled on by the horses of the railroad company. Notwithstanding such substantial omission, the board of assessors had proceeded to lay an assessment on the property owners for the cost of the work, had disregarded the various objections made by the plaintiff, and were about delivering over their assessment lists to the board of correction and revision when this action was commenced, and a preliminary injunction obtained. Much weight was given in the complaint to a charge of fraud and collusion, in erroneously setting out the resolution of December 22, 1869, above recited, and omitting, through mistake, the words "not to exceed," and under the supposition that the resolution authorized an absolute increased allowance of one dollar and fifty cents per square yard for the pavement irrespective of any more favorable bids or proposals, in consideration of the existence of only about one hundred yards of rock ; but this point has not been urged on the argument. This proceeding is also charged to be, in various respects, irregular and void, by reason : 1. Of the provisions of the act 1870, ch. 383, enacting, that no street or avenue that had once been paved at the expense of the owners of the adjoining property by assessment, should thereafter be paved with any patent pavement, unless petitioned for by a majority of the owners on the line of the proposed improvement ; nor unless the resolution or ordinance authorizing it should be approved by the

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mayor, and that any ordinance or resolution, theretofore passed without such approval or petition, and for which no contract had been entered into *and upon*, was thereby declared imperative and void. The allegations of the complaint assert this work to have been within the latter prohibition, but that is denied. 2. That the provisions or sections 7 and 37 of the charter of 1857, had been disregarded. Section 7 requires all resolutions and reports of committees of the common council, recommending any specific improvement requiring the appropriation of public money, or the taxing or assessing of citizens, to be published immediately after the adjournment of the board, in all the newspapers employed by the corporation, and that they shall not be passed or adopted until after such notice has been published two days, and that whenever a vote is taken in reference thereto, the ayes and noes shall be called and published in the same manner.

Section 37 also requires (among other things), that whenever a vote in either board is taken on the passage of an ordinance, which shall contemplate any specific improvement, or the expenditure of public money, or the laying of any tax or assessment, such ordinance shall, before the same shall be sent to the other board, and immediately after the adjournment of the board at which the same shall have been passed, be published with the ayes and noes, and with the names of the persons voting for and against the same, in the newspapers employed by the corporation, as part of the proceeding. These provisions have been recently held by the court of appeals, in the Matter of George W. Douglass (12 *Abb. Pr. N. S.*, 161), to be *mandatory*. 4. That notice for bids or proposals for doing the work was not published for at least ten days in each of the daily papers employed by the corporation for that purpose, as required by section 38 of the charter of 1857 (*Laws of 1857*, ch. 446). This is also denied. 6. That the pro-

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posals, contracts and papers relating thereto were never laid before the common council, or confirmed by that body, as required by the Corporation Ordinance of 1859, 178, § 15. It is denied that any such restraint existed, it being claimed that the contract became obligatory on execution by the Croton board, under chapter 30 of the *Laws of 1861*. 6. That the Stafford pavement being a patented article, the proceeding to invite proposals for a contract to lay it was a delusion and fraud, as no one but the patentee or his assignee for this city could undertake the work, and it was not a case allowing competition. This is also denied. 7. That the ordinance of March 10, 1868, only authorized the imposition of an assessment for the pavement, at five dollars per yard, and the amendatory resolution of December 22, 1869, increasing the price that might be allowed, did not authorize any assessment for the increased price, or that allowed in the contract for bridge stones. 8. It is also claimed that the existing ordinance of June 20, 1859 (*Corp. Ord., of 1859*, p. 237, § 2), providing that when the carriage-way of any of the streets had been repaired or newly paved, and the crosswalks laid and sidewalks extended to the width required by law, at the expense of the individual owners of the lots in the same, and the work approved, such streets or parts of streets should forever thereafter be paved, repaired and repaved at the expense of the corporation, but it was not to be construed to apply to any wooden pavement, was in the nature of a contract with the owners; that the avenue had been so previously paved, and this repavement was not chargeable to the owners of the lots; but this cannot be maintained (*Presbyterian Church v. Mayor, &c. of New York*, 5 *Cow.*, 538; *Rhineland v. Mayor, &c. of New York*, 24 *How. Pr.*, 305; *In re Lewis*, 51 *Barb.*, 81; *Tilden v. Mayor, &c. of New York*, 56 *Id.*, 340).

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It has been established by numerous decisions of the courts of the State, that their equitable powers could not be invoked by a party claiming to be injured by the imposition of a public tax or assessment, creating a lien upon or affecting the title to his property, when the adverse claimant through such proceeding is required to show its entire regularity; and the alleged irregularity or error must be disclosed by the record of the proceeding when so produced, or in the course of the proofs necessary to be adduced to show the existence and due exercise of the power to impose the tax. Neither the actual invalidity nor the threatened injury, arising from the imposition of an ostensible lien or cloud upon the title, furnishes any ground for interference by injunction, nor will that remedy be interposed, while there is an adequate remedy at law to resist, or to review and correct the erroneous proceeding. The exceptional cases in which a court of equity will interfere, are only such as are brought within some well acknowledged head of equity jurisdiction, and are embraced within three classes, First. Where the proceeding in the subordinate tribunal will necessarily lead to a multiplicity of suits. Second. To the commission of irreparable injury, and Third. Where the title to be derived under it is *prima facie* valid by force of the instrument or proceeding sought to be enjoined or set aside (*Susquehanna Bank v. Supervisors of Broome County*, 25 *N. Y.*, 314; *Overing v. Foote*, 43 *Id.*, 290; *Dows v. City of Chicago*, 11 *Wall.*, 108; *Tilden v. Mayor, &c., of New York*, 56 *Barb.*, 340); and extrinsic facts are necessary to be proved, in order to establish its invalidity or illegality (*Heywood v. City of Brooklyn*, 14 *N. Y.* [4 *Kern.*], 537).

As to the first ground, the grievance of being liable to a multiplicity of suits must be one to which the *plaintiff* is subject, and of which he complains. A person liable in respect to a proceeding which may create a

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lien or cloud on the title of his separate property, cannot act as a volunteer for others, and initiate and maintain an action, as well on his own, as on the behalf of others whose property may be similarly affected. The utmost to be apprehended by the proceeding sought to be enjoined, so far as plaintiff is concerned, is, that it will create a distinct lien for some specific amount upon his separate property. In the protection of his own property, he has no unity of interest with any others, and the only community of interest, is that which exists in the legal questions involved.

Actions authorized to be brought by one, on behalf of a class, partake of the character of actions *in rem*, and the judgment binds all the parties having a common interest in the property or fund in dispute, whether they come in and are made parties or not. It is manifest from the present case, that the right of the plaintiff to institute and carry out a litigation involving mere questions affecting the title to his own lots, can, upon no principle of equity or justice, involve or supersede that of any other person to test the same question, so far as it affects his own property, in such way as they choose. The decisions clearly negative any assumption of championship for others (*Bouton v. City of Brooklyn*, 15 *Barb.*, 375; *Magee v. Cutler*, 43 *Id.*, 239; *Thurston v. City of Elmira*, 10 *Abb. Pr. N. S.*, 119; *Watson v. City of Brooklyn*, opinion of Judge GILBERT, *MSS.*).

No case of irreparable damages is suggested, but it is claimed that the case presents numerous facts beyond those which would be apparent on the face of the proceeding, or which would necessarily be required to be shown on the trial as existing to create the power, or the due course of its execution.

I am unable to discover any such extrinsic fact, material to the controversy, which it would not be permissible to establish, either on a trial of such title as would be conferred upon an assessment sale, or cer-

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tiorari, or upon proceedings had to annul or correct the assessment under the provisions of chapter 338 of the *Laws of 1858*, and section 27 of chapter 383 of the *Laws of 1870*.

But if, in the many matters alleged in the complaint by way of impeachment of the regularity or validity of the proceeding, there may be some partaking of the character of *extrinsic facts*, they do not constitute any ground for maintaining this action, and they would only be available as ground for a suit in equity where either the record of the proceeding or the lease to be executed, or any sale for the assessment should constitute such *prima facie* evidence of the correctness of the proceeding, as would be necessary to rebut or disprove. In *Heywood v. City of Buffalo* (14 *N. Y.* [4 *Kern.*], 541), JOHNSON, J., states the rule: "In order to bring the case within the third exception (above stated) and the jurisdiction of equity on that ground, the complaint should have alleged distinctly and plainly that the proceedings were apparently within the powers of the common council, and *upon their face were valid, and created a valid lien*; and it should have then alleged, that notwithstanding such apparent validity, the proceedings were wholly void, by reason of certain *extrinsic* matters which should be stated, and which it should appear by the complaint could *only* be established by other evidence. *These facts are the very ground of the jurisdiction. Apparent validity and total invalidity in fact.*"

The *gravamen* of this complaint does not rest on any such matters; the entire invalidity of the assessment is asserted on numerous substantial grounds, and while the case presents such features, the basis for equitable interference, or for maintaining the injunction, is wanting.

For these reasons, the injunction should be dissolved, and the motion for its continuance denied, with ten dollars costs.

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WALL *against* GORDON.

*New York Common Pleas; Special Term, March,
1872.*

INJUNCTION.—PUBLIC DEDICATION OF MUSICAL
COMPOSITION.

Copies of a musical composition were left by the author with a music dealer, for sale, but with instructions not to sell any before a specified time. *Held*, that their sale, after the lapse of the period limited, constituted a complete dedication of the work to the public. *Held*, accordingly, that an injunction would not lie to restrain third persons from publishing it.

Motion to continue injunction.

This action was brought by Harry Wall against Stephen T. Gordon and others, upon facts which are stated in the opinion.

ROBINSON, J.—From the complaint, answers, affidavits and depositions read on this motion, it appears, that in February, 1870, plaintiff, jointly with George W. Hunt, both being residents of London, composed a literary and musical song styled, "When the Band Begins to Play," both song and music being original. By assignment, dated May 19, 1870, Hunt transferred his interest therein to plaintiff. Prior to August 9, 1871, the plaintiff, being sole owner and proprietor of the song and music, caused them to be engraved and printed in the usual form of such musical publications (sheet music), and about that date, placed two hundred copies in the hands of Wrippers & Co., music dealers in London, for sale, with written instructions

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not to sell any of them until September 11, 1871, the restriction being made to enable him to come to the United States, and, previous to that date, secure a copyright here. He arrived in August, and secured his copyright September 9, 1871. Before leaving England, he had exposed for sale and sold copies of the *song*, without the musical accompaniment; and it also appears, that prior to September 11, some copies of the song and music, which he had left with Wrippert & Co., had been sold or got into circulation, and were brought into the United States, where they were published and sold in the early part of that month.

As to the musical composition accompanying or illustrating the song, plaintiff is not shown to have made any publication of it, except by obtaining copyright therefor in England and the United States, and entrusting the two hundred printed copies with Wrippert & Co., for sale upon the terms above mentioned. His rights under the copyright laws are not enforceable in this action, nor are those he enjoys as author, by virtue of the common law, if he had authorized a publication of his work (even if protected by his copyright). As to the song, such publication by plaintiff was not disputed on the argument, and the only substantial question left for my decision is, whether the circumstances under which the two hundred copies of the sheet music were left with Wrippert & Co., and their sale of said copies, constituted an unqualified publication and dedication to the public? The point that the obtaining of a copyright under our laws was such dedication, as urged by defendants, has been decided adversely by our court of appeals in *Dewitt v. Palmer* (reported in *New York Times*, March 13, 1872). But as to the transactions in London, in leaving two hundred copies with music dealers for sale on his account, subject only to the restriction on their general authority that they should not be sold

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previous to September 11, 1871, I am of the opinion that it constituted a complete dedication to the public, of the right possessed by plaintiff as author (or assignee of Hunt), from and after that date. That authority was never revoked, plaintiff still expecting an accounting by Wrippert & Co., his agents for sales, made in conformity to it. By entrusting these two hundred copies to these music dealers in London, he did not communicate a knowledge of the contents of his and Hunt's labor to a select few under the restriction of private intercourse (*Keene v. Wheatly*, 16 *Am. Law Reg.*, 44); nor as a mere dramatic representation upon the stage (*Roberts v. Myers*, 23 *Mo. Law R.*, 539; *Bourcicault v. Wood*, 16 *Am. Law Reg.*, 539; *Palmer v. Dewitt*, 2 *Sweeny*, 530), but he authorized its unrestricted publication, both as to persons and purposes, on and after September 11, 1871.

The case presented shows that under such unrestricted sale, the defendants claim and exercise the right of singing and using the song or musical composition in question.

Any such public dedication authorizes a general use, and, under the views expressed, it is unnecessary to discriminate as to the several defenses, as no cause of action is established.

The injunction, upon these considerations, should be dissolved, and its continuance denied, with ten dollars costs as to each of the defendants who have separately appeared and answered.

Order accordingly.

Kern v. Rachow.

KERN *against* RACHOW.

*New York Superior Court; Special Term, January,
1872.*

ARREST. — AFFIDAVIT OF FRAUDULENT DISPOSAL OF
PROPERTY.

Where a debtor, shortly before the maturity of his indebtedness, sold his property for less than its value to a relative, to be paid for conditionally, and afterward refused to exhibit his books of account,—*Held*, that these facts were evidence of a disposal of his property with intent to defraud his creditors.

Appeal from an order.

William Kern and Conrad Homel sued J. Rachow, in the superior court.

The action was to recover the value of wood mouldings sold by the plaintiff to the defendant, between March 1, 1870, and January 1, 1871, and for which defendant gave plaintiff his note, dated January 18, 1871, payable three months after date. An order of arrest was granted on the ground that the defendant had disposed of his property with intent to defraud his creditors.

The affidavit, dated May 5, 1871, on which the order of arrest was granted, alleged that plaintiff held defendant's note, payable April 21, 1871. That defendant, on March 18, 1871, was possessed of stock in trade, &c., worth two thousand dollars, which he on that day sold to one Holstein, his brother-in-law, who had failed several times, for five hundred dollars, to be paid on January 1, 1872, if the business was good, and

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if he was successful therein. That defendant had refused to exhibit his books of account to plaintiffs, although he had been frequently requested to do so. That the note held by plaintiffs had been protested, and no part thereof paid.

An attachment against the property was also in existence for another debt of some creditor. Defendant moved at special term, on plaintiffs' affidavits, to have the order of arrest vacated. The motion was granted, and plaintiffs appealed to the general term.

David McAdam, for the plaintiffs, appellants.

Henry Wehle, for the defendant, respondent.

BY THE COURT.—CURTIS, J.*—The plaintiff's affidavit shows, that about one month before the defendant's note fell due, the defendant sold his stock, business and articles contained in his place of business, which, with the outstanding claims, were worth two thousand dollars, to one Holstein, his brother-in-law, and who had failed several times, for the price of five hundred dollars, payable January 1, 1872, provided the business was good, and he was successful. That the defendant had refused to show his books, or give any satisfactory or full statement of his affairs. That he owes other debts, and that his property has been attached.

The defendant moves to vacate the order of arrest on the plaintiff's own affidavit, and does not explain or deny any of the matters alleged in the plaintiff's affidavit. If these allegations are not met by a denial, on a motion to discharge from arrest, they must be taken to be true (*Wolfe v. Brower*, 5 *Robt.*, 604; *Union Bank v. Mott*, 9 *Abb. Pr.*, 108).

* Present, McCUNN, P. J., CURTIS and SEDGWICK, JJ.
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When a debtor, shortly before the maturity of his indebtedness, sells his property for less than its value, to a relative, to be paid for conditionally, under the circumstances, and in the manner charged by the plaintiffs, and makes no denial or explanation, a case arises where the creditor is entitled to the remedy afforded under subdivision 5 of section 179 of the Code. A contrary view of it would tend to withhold the relief and protection designed by the framers of the law, to be given to creditors, and serve substantially to promote the designs of knavish and fraudulent debtors.

The order appealed from should be reversed, with costs to the plaintiff.

TOWNSEND *against* INGERSOLL.

Supreme Court, Second Department; General Term, 1872.

STATUTE OF LIMITATIONS.—ADMINISTRATION.

Payments, on a debt which is barred by the statute of limitations, made to the widow of the creditor dying intestate, though made before she had taken out letters of administration, will take the debt out of the statute, so as to enable her to maintain a suit on it as administratrix, upon taking out letters.*

Appeal from a judgment.

Ann W. Townsend, as administratrix of Thomas Townsend, deceased, sued Platt C. Ingersoll in the supreme court, in 1870, on a promissory note made by defendant to plaintiff's intestate, in 1854.

* As to payments where there are both a domestic and a foreign administration, compare *Stone v. Scripture* (4 *Lans.*, 186).

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The defense was the statute of limitations, and that the note had been given as collateral security for the performance of an agreement which had been fulfilled.

On the trial the referee found that Thomas Townsend died in 1868, and that in 1869 defendant paid to his widow, the plaintiff, certain sums on account of the note. That in 1870 the plaintiff took out letters of administration on her husband's estate. He also found that the said note was not given by defendant to said Thomas Townsend as collateral security for any debt due by O. S. Gregory and defendant as copartners, or said Gregory to said Townsend, or as collateral security for the performance of any agreement upon the part of said Gregory.

Plaintiff had judgment, and defendant appealed to the general term.

Henry S. Bellows, for defendant, appellant ;—Cited 8 *N. Y.*, 75 ; 9 *Id.*, 362.

Andrew Gilhooly, for plaintiff, respondent. — I. Each of the new contracts having been made with the plaintiff, the widow of the intestate, who had possession of the note in suit, and was acting on behalf of the intestate's estate, *for its benefit*, before letters granted, her letters of administration will relate back in order that the estate may not lose the benefit of the contract, and thus enable the plaintiff to sue upon it in her representative capacity (*Bodger v. Arch*, 10 *Exch.*, 333 ; *Williams on Exrs.*, 557, London ed., 1866). The distinction between the time of the vesting of the title of an executor and that of an administrator has become of no practical importance for it is now settled beyond all question that the title of the administrator, after his appointment, vests from or relates back to the death of the intestate (3 *Redf. on Wills*, 128). Thus, the administrator may recover against a wrongdoer who has

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seized or converted the goods of the intestate, before letters granted, in an action of trover (*Com. Dig. Administration*, B., 10; 18 *Vin. Abr.*, 285; *Rockwell v. Saunders*, 19 *Barb.*, 473). Or, he may bring trespass, although this is an action founded on the right to possession. "The relation fixes the possession from the beginning" (2 *Roll. Abr.*, 554, tit. Trespass, pl. 2; *Year Book*, 36 *Hen. VI.*, fol. 8; *Tharpe v. Stallwood*, 5 *Man. & Gr.*, 760). The ancient reason for this relation was, that "otherwise there would be no remedy" (per *ROLLE*, Ch. J., *Long v. Hebb*, *Style*, 341, A. D. 1652). The true principle, as deduced from the later cases, stands upon a broader and more symmetrical basis, viz: "The title of an administrator relates back to the death of the intestate, for the purpose of supporting the rights of the intestate, and of *ratifying acts for the benefit of his estate*, and giving a remedy where otherwise there would be none; but not to affect the rights of third persons to the estate vested intermediate the death and letters granted, or to take away those of the intestate, according to the maxim, '*in fictione juris semper consistit equitas*'" (*Leber v. Kauffelt*, 5 *Watts & S.*, 440, 5). In the last case cited, one who had paid a claim against an intestate's estate, and afterwards took out letters of administration, was held entitled to sue in his representative capacity, on a bond given to the intestate to indemnify him against that claim. So where a note belonging to the estate of an intestate was paid to his widow who subsequently united with another in taking out letters of administration, and they then brought an action on the note in their representative capacity, the letters were held to relate back and render the payment to the widow a bar to the action (*Priest v. Watkins*, 2 *Hill*, 225). While there are certain cases in which the doctrine of relation has not been allowed, yet they will be found to be those in which the fiction is set up to di-

vest some right of a third person to the estate which vested intermediate the death of the intestate and letters granted, as *Gilb. Eq.*, 223, or to prejudice the right of the intestate; as *Morgan v. Thomas*, 8 *Exch.*, 302; *Murray v. East India Co.*, 5 *Barn. & AL.*, 204; *Pratt v. Swaine*, 8 *B. & C.*; *Steward v. Edmonds*, 1 *Wms. on Exrs.*, 4 ed., 834, note *u*; *Parsons v. Mayesden*, *Freeman*, 151). The New York decisions proceed on the doctrine of the earlier English cases, and of *Williams v. Norwith* (*Style*, 337), and hold that the grant of letters of administration relates back to the death of the intestate, and legalizes *all* intermediate acts of the administratrix *ab initio*, whether beneficial to the estate or otherwise, in the absence of fraud or collusion (*Vroom v. Van Horne*, 10 *Paige*, 549, 558; *Rattoon v. Overacker*, 8 *Johns.*, 226).

II. Even if the payments on account of the defendant's indebtedness to the intestate had been made by the defendant to a third person holding the note, and been received as such, the act of such third person could have been ratified by the plaintiff after letters granted, and the new promise, raised by the payments, been rendered available to the plaintiff as administratrix. The act would have been ratified by making a legal demand for the benefit of the contract thus made, by bringing suit (1 *Am. Lead. Cas. Hare & W.*, notes 593); and where one means to act as agent for another, a subsequent ratification by the other is always equivalent to a prior command; nor is it any objection that the intended principal was unknown at the time (*Hull v. Pickersgill*, 1 *Brod. & Bing.*, 282; *Foster v. Bates*, 12 *M. & W.*, 226). So where one received sums of money from an intestate's debtors, the subsequently appointed administratrix was held entitled to waive the tort, ratify the receipt of the money and recover the same in an action for money had and received to her use *as administratrix*.

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(Welchman v. Sturgis, 13 Q. B., 552). The administrator may ratify a contract made by procuration, or *in any other form*, before his appointment on behalf of the estate, so as to take the benefit of it, *the same as if his authority had been of a date anterior* (3 Redf. on Wills, 127).

III. The provisions of the Revised Statutes (2 Rev. Stat., 81, § 60, and *Id.*, 449, § 17) were not intended to work any alteration in the common law in respect to the doctrine of the relation of letters of administration (Priest v. Watkins, 2 Hill, 226). At common law if one who was neither executor nor administrator inter-meddled with the goods of the deceased, or did any act characteristic of the office of executor, he thereby made himself an executor of his own wrong or *de son tort* (Swinburne, pt. 4, § 23, pl. 1; Godolph, pt. 2, ch. 8, § 1; Wentworth, Off. Exrs., 14 ed., ch. 14, p. 320). When one so acted as to become executor *de son tort*, he thereby rendered himself liable not only to an action by the rightful executor or administrator, but also to be sued as executor by a creditor of the deceased or by a legatee, for an executor *de son tort* had all the liabilities though *none of the privileges*, that belong to the character of executor (Carmichael v. Carmichael, 1 Phill. E. C., 103, per Lord COTTENHAM; Williams on Exrs., 217; 2 Blacks. Com., 495). He could not bring an action himself in the right of the deceased (Bro. Abr., tit. Administration, 8), so that even at common law the plaintiff in this action could not be heard as executor *de son tort*. He was chargeable with the debts of the deceased, so far as assets came to his hands (Dyer, 166), and as against creditors in general was allowed all payments made to any other creditor (1 Ch. Ca., 33), himself excepted (5 Rep., 30; Moore, 527). By statute (2 Rev. L., p. 313, § 13, copied from 43 Eliz., ch. 8, 1 Chitty St., 3 ed., 1416), an executor of his own wrong was declared liable for all assets

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coming to his hands, with the privilege of retaining for debts due him from the intestate, and of being allowed for all proper payments made by him. 2 *Rev. Stat.*, 81, § 60, deprived him of this *statutory privilege*. 2 *Rev. Stat.*, 449, § 17, abolished the *common law liability*, and rendered him responsible as a *wrongdoer* to the lawful representative of the estate. The sole intention was manifestly to alter the *theory* of the *liability* of *third persons* to the rightful executor or administrator, for their *wrongful* acts, and to *restrict* this liability to such executor or administrator, as trustee not only of the intestate, but also for creditors. It was not to deprive the rightful representative of his common law right to avail himself of acts done or contracts made on behalf of the estate *for its benefit*.

BY THE COURT.* — BARNARD, J. — The payment made by defendant upon the note in question, to the plaintiff, before she had taken out letters of administration on the estate of her husband, was a good payment to her as administratrix, she subsequently having taken out letters. She had possession of the note, and the payment was for the benefit of the estate, and all her acts are confirmed for the benefit of the estate, from the time of the death of her husband by relation.

The evidence fully sustains the referee in his finding, that the note was not given by defendant to deceased, as collateral security for any debt due from O. S. Gregory and defendant, as partners, or for a debt due deceased from Gregory, or as collateral security for the performance of any agreement upon the part of said Gregory.

The judgment should be affirmed, with costs.

* Present, J. F. BARNARD, P. J., GILBERT and TAPPAN, JJ.

Hovey v. Rubber Tip Co.

HOVEY *against* THE RUBBER TIP COMPANY.*New York Superior Court ; General Term, June, 1872.*

INJUNCTION DAMAGES.—UNDERTAKING.

General counsel fees and costs paid in defense of an injunction suit are not to be included in the damages sustained by reason of the injunction, within the meaning of the ordinary undertaking, where other relief was sought beside the injunction. In such a case, if the injunction is not dissolved on application, but on the trial of the cause, the costs, &c., sought to be recovered, must be shown to have been incurred in respect to the injunction alone.

Appeal from an order.

This action was brought by Samuel D. and Elbridge S. Hovey, plaintiffs and respondents, against The Rubber Tip Pencil Company, defendants and appellants, and now came before the court on an appeal from an order denying motion to confirm the report of the referee, appointed to ascertain damages sustained by defendant, by reason of the injunction.

At the commencement of the suit, an *ex-parte* injunction was granted upon an undertaking, pursuant to section 222 of the Code, that the plaintiffs would pay to the defendant such damages as it may sustain by reason of the said injunction, if this court shall finally decide that the said plaintiffs were not entitled thereto, not exceeding five hundred dollars.

This injunction remained in force, until the trial of the action before Mr. Justice JONES, when judgment was recovered by the defendant dismissing the complaint, from which no appeal has been taken.

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An order was subsequently made, appointing a referee to ascertain the damages sustained by defendant, by reason of the injunction, who, after hearing proofs, reported that said defendant is entitled to recover, upon said undertaking, the sum of five hundred dollars as damages sustained by reason of said injunction, which damages consisted of counsel fees incurred and expended by defendant, in obtaining a dismissal of the complaint, and which was reasonable in amount.

The report was filed, and a motion to confirm it heard before Mr. Justice JONES, and December 31, 1871, an order was made by him, denying the motion.

Upon the decision of the motion, the following opinion was delivered :

JONES, J.—This was an action in equity brought to procure a permanent injunction against defendants' continuing to do certain acts which they were committing in violation, as it was alleged, of plaintiffs' rights, and to recover damages for the acts already done.

At the commencement of the action, plaintiffs obtained, under sections 218 and 219 of the Code, a temporary injunction, to the same effect as the permanent one prayed for by the complaint, and upon obtaining such temporary injunction, gave the undertaking required by section 222.

The defendants answered the complaint. The issue joined was brought to trial, and the cause tried on the merits. The result of the trial was a judgment dismissing the complaint, and adjudging that plaintiffs were not entitled to the injunction prayed for.

After the entry of judgment, defendants, pursuant to the provisions of the undertaking, procured a reference, to ascertain the damages sustained by them, by reason of the injunction. On such reference, the ref-

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eree assessed such damages at a certain sum, being for general counsel fees in the cause. Defendants had made no motion to dissolve the temporary injunction.

The undertaking under which the questions here involved arise, is to the effect that plaintiffs will pay to the defendants such damages (not exceeding a specified amount), as they might sustain by reason of the temporary injunction, if the court should finally decide that the plaintiffs were not entitled thereto.

It is clear that the judgment rendered in this case was, within the meaning of the undertaking, a final decision by the court, that the plaintiffs were not entitled to the injunction; and, it is also clear, that the effect of that judgment was to dissolve the temporary injunction.

The question presented is, whether general counsel fees paid or incurred in the defense of the action, come within the provision of the terms of the undertaking as damages sustained by reason of the injunction?

This depends upon whether the defense was undertaken solely by reason of the existence of the injunction. I say *solely*, since if any other cause operated, the defense became necessary, whether there was an injunction or not, and the same liability for counsel fees would be incurred in that defense, whether there was the adjunct of the injunction or not.

Prima facie, an action is defended to prevent the defendant being either restrained from doing some act or acts, or compelled to do some act or acts; or from being affected in his rights or interests in some property, real or personal, or mixed; or adjudged liable to pay a sum of money; or estopped in any future litigation upon some matter involved, by the judgment to be rendered in such action.

If a defendant claims that he defended for none of these purposes, but solely for the purpose of vacating, by means of a judgment in his favor, an order or or-

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ders made in the action before he puts in his defense ; claiming, in fact, that but for such order or orders, he would not have defended, as in that case it would be wholly immaterial to him what judgment was rendered, it is incumbent on him to convince the court, by an argument drawn from the allegations and prayer of the complaint, the averments of his answer and the provisions of the order complained of, that such was the sole object of the defense.

The cases of *Edwards v. Bodine*, 11 *Paige*, 224 ; *Aldrich v. Reynolds*, 1 *Barb. Ch.*, 613 ; *Wilde v. Joel*, 15 *How. Pr.*, 329 ; *Corcoran v. Judson*, 24 *N. Y.*, 106, are not in conflict with the above views, but on the contrary, as I read them, are in accordance therewith. In *Edwards v. Bodine*, a motion to dissolve the injunction had been made, which was granted. The only counsel fee allowed, was one of one hundred dollars for arguing that motion, and so much of the taxable costs as were applicable to that motion (pp. 225, 227). The general taxable costs in the suit and general counsel fees were not allowed.

The case of *Aldrich v. Reynolds* is based solely on the decision in *Edwards v. Bodine*, and cannot be regarded as going beyond it. Although it does not distinctly appear that a motion to dissolve was made in this case, yet it is to be gathered from the language of the case, that such was the fact. For the case states that the master allowed the taxable costs of the defendant, in obtaining a dissolution of the injunction, and twenty-five dollars paid as extra counsel fee in obtaining such dissolution, which ruling of the master the chancellor affirmed.

Similar language is used in *Edwards v. Bodine*, where he says, *arguendo* : "The object of the court in requiring a bond in such cases will be best effected by giving to the language of the condition of the bond its natural sense ; which will cover the necessary

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costs and counsel fees to obtain the dissolution of the injunction, as well as the damages which the party enjoined has otherwise sustained, during the time the injunction was in force." What is intended by the phrase "necessary counsel fees to obtain the dissolution of the injunction," is shown by the decision modifying the vice-chancellor's decretal order, "so as to allow the hundred dollars charged for the extra fees to the two counsel employed to argue the case, upon the *motion* for a dissolution of the injunction."

The defendants have not in this case convinced me by any argument drawn from the allegations and prayer of the complaint, the averments of the answer and the provisions complained of, that the sole object of its defense was to procure, by means of a judgment, a vacation of the order of injunction.

An inspection of the pleadings shows, that plaintiffs claim to be the only persons authorized and empowered to manufacture and sell certain patented lead pencils, and seek a judgment against defendants restraining them from doing certain acts interfering with this sale of pencils, and for five thousand dollars damages.

The defendants, by their answer, claim that they are the owners of certain patents for the manufacture of certain lead pencils; that the letters patent under which the plaintiffs claim was only an alleged improvement on the patents of the defendants, and can be used only in connection with the inventions secured by the letters patent owned by them, the defendants, and can only be used with the consent and license of the defendants first obtained, which consent and license they have never given; and therefore they claim the right to do the acts complained of.

From this it is evident that even if no preliminary injunction had issued, the defendants would have found themselves obliged to defend. For if the action went by

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default, the judgment must necessarily have determined, as against defendant, the plaintiffs' right to manufacture and sell as claimed by them, without any interference by or on behalf of defendants, other than by a regular action instituted to determine the rights of the parties.

If such a judgment would not be prejudicial, and for that reason it was unnecessary to defend the action, then the preliminary order was not prejudicial, and there was no necessity to defend the action to get rid of it.

But further than this, if no defense had been interposed, a judgment for damages might have been recovered against defendant.

The exposure to such a judgment called for a defense, wholly irrespective of the issuance of the preliminary injunction.

The motion to confirm the referee's report must be denied, and his report wholly set aside and the counsel fees disallowed.

John H. Washburn, for defendants, appellants.—I. Counsel fees paid by defendant in obtaining a final decision that plaintiffs were not entitled to the injunction, are, if reasonable, a proper item of damage. The language of the undertaking, following that of Code (section 222), is, that the plaintiff will pay "such damages" to defendant "as it may sustain by reason of the said injunction, if this court shall finally decide that the said plaintiffs were not entitled thereto." It is well settled that reasonable counsel fees, and expenses actually paid in *obtaining* a final decision, that the plaintiff was not entitled to the injunction, are proper items of damage to be allowed (*Edwards v. Bodine*, 11 *Paige*, 224; *Aldrich v. Reynolds*, 1 *Barb. Ch.*, 613; *Wilde v. Joel*, 15 *How. Pr.*, 329; *Corcoran v. Judson*, 24 *N. Y.*, 106). The only question is, whether

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they were, in fact, paid in obtaining such final decision. There is nothing in either the Code or the undertaking, prescribing the manner or procedure by which such final decision shall be obtained. It is admitted by plaintiffs that counsel fees paid in obtaining a dissolution of the injunction by motion, provided it is followed by final judgment, are allowable, but claimed to be limited to such; and that as, in the present case, there was no such motion, but the counsel fees allowed were paid in defense of the action generally, defendant cannot recover them. 1. The referee finds as a matter of fact, "that this court did finally decide on the trial of this action, that said plaintiffs were not entitled to said injunction," and "that the said defendant incurred and necessarily expended in obtaining such final decision "expenses and counsel fees," amounting to more than the sum specified in the undertaking; and it was admitted by plaintiffs, and so reported, that they were reasonable (fols. 9, 10, 11, 33). It is urged that said findings of fact by the referee should be held conclusive. 2. If the question is to be considered open, then it is claimed, that the restriction of counsel fees to such as should be incurred in a special motion to dissolve, as claimed by plaintiffs, is supported by neither principle nor authority. A motion to dissolve, if successful, may be a part of the procedure by which such final decision may be obtained, but it is not conclusive (*Methodist Churches v. Barker*, 18 *N. Y.*, 465; *Childs v. Lyon*, 3 *Robt.*, 704). It follows, then, if plaintiffs' theory be correct, that while entitled to counsel fees in an inconclusive motion, those reasonably expended in obtaining a final, direct, and necessarily conclusive decision, upon which, by the very terms of the undertaking, the right to any damages is made to depend, are not to be allowed. And that, should such motion to dissolve fail, and yet subsequently, upon the trial, it should be finally de-

cided that plaintiffs were not entitled to the injunction, yet defendant would be remediless. On the contrary, a dismissal of the complaint on the final hearing of the cause, includes, by force of the term itself and of the law applicable to it, a determination that the party was not equitably entitled to the injunction (*Loomis v. Brown*, 16 *Barb.*, 325). A dismissal of the complaint undoubtedly dissolves the injunction (*Disbro v. Disbro*, 37 *How. Pr.*, 148). 3. If the injunction were granted upon grounds independent of the cause of action, it might admit of some question, if a trial of the merits would be considered a decision of the right to the injunction ; but where the issues as to the merits and the injunction are the same, it is urged that no question can properly be raised. But, in the present case, the cause of action and grounds of the injunction are identical, and the issues as to both one and the same. The decision upon the merits is not and does not involve the decision of any other issue or question, than is involved and must be decided in deciding whether the plaintiffs were or were not entitled to the injunction. The suit was commenced for the sole purpose of obtaining and continuing forever the injunction, and the defendant was made such solely to reach it by injunction. The terms of the injunction order and the prayer of the complaint are precisely the same, and if the latter be granted, the temporary injunction is included and justified. The right to the injunction is and must be directly decided by the decision upon the merits, and is not merely a result. And to decide that plaintiffs are not entitled to a perpetual injunction is to decide that they were not entitled to the temporary injunction. In such case it cannot be doubted that the general counsel fees of the defendant, reasonably incurred, should be allowed to the extent of the undertaking. 1 *Tillinghast & Shearman's Practice*, 728, in which it is said : "It would seem that if a party to the

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action is made such solely in order to reach him by the injunction, his general counsel fees should be allowed,"—citing *Wilde v. Joel* (*supra*). The complaint and prayer for damages does not affect the identity of the issues, nor afford valid reason to claim that such counsel fees were not expended in obtaining a decision that the plaintiffs were not entitled to the injunction. The right to damages claimed and their assessment depend entirely upon the prior decision, that plaintiffs are entitled to the injunction prayed for. The question of damages is not an issue upon the trial, but to be determined by a reference after trial and order for judgment. Indeed, as a general rule, it may be said that the jurisdiction for damages does not attach in equity except as *ancillary* to the relief prayed for. 2 *Story Eq. Jur.*, Redfield's ed., § 799. The trial in the present case was simply upon the question of whether plaintiffs were or were not entitled to an injunction against the defendants. The counsel fees expended by defendants were upon this question only. Of the cases relied on by plaintiffs before the referee (*Town of Guilford v. Cornell*, 4 *Abb. Pr.*, 220, and *Strong v. De Forest*, 15 *Id.*, 427), the former in no respect sustains, but, on the contrary, substantially negates it. Judgment was rendered in favor of defendants, but an order made continuing the injunction pending appeal to the court of appeals. That appeal being unsuccessful, it was simply decided that the counsel fees incurred by defendants, in defending that appeal, could not be allowed under the undertaking, because the injunction was terminated by the judgment, and the order continuing it was a new injunction, requiring a new undertaking. The subsequent counsel fees, upon the appeal, were, therefore, disallowed; but the referee's report was in all other respects confirmed. In the other case (*Strong v. De Forest*), which is not satisfactorily reported, a distinction appears to have been

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made between services relating to the injunction, and services generally in the case, and the report sent back because the distinction did not appear. The justice seems to have held, also, that counsel fees incurred in the mere "preparation" of a motion to dissolve, which was, in fact, never made, are, nevertheless, allowable; which is inconsistent with the decision in *Childs v. Lyon* (3 *Robt.*, 704). The note appended to the report shows that the referee's report, as amended and explained, was subsequently confirmed by another justice, for the full amount originally reported. It does not appear in the report, whether the issues of the injunction and action were or were not the same; but as counsel is informed, one of the attorneys in that case, *Samuel Brown, Esq.*, 291 Broadway, states that they were not the same, but distinct; and further states that full counsel fees, in the case, were allowed, to the amount of the undertaking; and, also, the expenses of both references, in addition. So far, therefore, as that case can be considered an authority at all, it does not apply to the present. The recent decision of the general term of the supreme court in this district, reversing the order confirming the referee's report of such damages in the case of *Andrews v. Glenville Woolen Co.*, is equally inapplicable, for in that case, also, the issues of the injunction and action were not the same, but the injunction was simply a collateral protection; the action being to compel payment to plaintiff, as receiver of the company, of a debt due it from the other defendants, and the injunction restraining the company from collecting it, pending the suit. Even in that case, the referee, *Henry Nicoll, Esq.*, allowed counsel fees incurred in a motion to dissolve, which was denied, and also in the subsequent trial of the merits, wherein the complaint was dismissed; and Judge SUTHERLAND confirmed his report. Upon appeal to general term this was reversed, Judge INGRA-

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HAM, in a short opinion, holding neither item properly chargeable : the first because the motion was denied ; and, as to the other, citing *Strong v. De Forest*, *supra*, as holding the costs of trial of the issue not to form any grounds for damages on the undertaking. And an appeal from this decision is now pending in the court of appeals. It is urged that the restriction of the rule of damages claimed by plaintiffs, involves manifest inconsistencies and injustice, and is supported by no direct adjudication ; while that claimed by defendant is supported by both principle and substantial authority, and is the only rule by which defendant can obtain the indemnity, which, by the fair construction of the law, it is entitled to, and is intended to be given.

II. Should the court confirm the report, it is claimed that under all the decisions, in addition to the damages reported, the referee's fees are to be allowed ; and, also, the costs of the motion. Defendants are, also, entitled to a reasonable counsel fee upon this proceeding (*Willett v. Scovil*, 4 *Abb. Pr.*, 405).

III. On the confirmation of the report, judgment may be ordered directly against the sureties in the undertaking, without compelling defendants to resort to a regular action upon the undertaking (*Willett v. Scovil*, *supra*). It is true that in *Wilde v. Joel*, *supra*, Judge HOFFMAN, in alluding to this question, but without deciding it, expressed the opinion that it was safest to bring an action on the undertaking ; but when, some years later, the same learned judge published his *Treatise on Provisional Remedies*, he remarked as to this (p. 333) : " I have not met with any other authority to this effect. There is an impression with the bar that it can be done " (See, also, *Methodist Churches v. Barker*, 18 *N. Y.*, 465 ; *Dickerson v. Cook*, 3 *Duer*, 324).

Ambrose Monell, for plaintiffs, respondents.—I.

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The defendant has not shown that it has sustained any damages by reason of the injunction obtained by the plaintiffs (*Town of Guilford v. Cornell*, 4 *Abb. Pr.*, 220). In the case of *Strong v. De Forest* (15 *Id.*, 427), the facts of the case are sufficiently disclosed in the opinion (And see *Coates v. Coates*, 1 *Duer*, 664; *Wilde v. Joel*, 15 *How. Pr.*, 220; *Edwards v. Bodine*, 11 *Paige*, 223; *Childs v. Lyons*, 3 *Robt.*, 704).

BY THE COURT.—CURTIS, J.*—The complaint in this action, in addition to seeking relief by an injunction, also set up that the plaintiffs have been injured by the defendants' acts and sustained damages to the extent of five thousand dollars, and demands judgment against the defendant to that amount.

It is clear that counsel fees are to be allowed when they have been incurred in a successful motion to dissolve the injunction (*Coates v. Coates*, 1 *Duer*, 664).

It also appears that reasonable counsel fees, and expenses paid in obtaining a final decision that the plaintiff was not entitled to the injunction, are proper items of damage to be allowed.

The question for consideration is, whether the counsel fees and costs paid by the defendant during the litigation including the trial, and which were allowed by the referee as damages by reason of the injunction, were paid in obtaining a decision that the plaintiff was not entitled to the injunction.

The pleadings and the evidence do not satisfactorily show that such payments were made in obtaining a dissolution of the injunction. The claim for damages made by the plaintiff was an element in the case, and which, irrespective of the demand for an injunction, has to be met, and prepared for. The pleadings in this suit and the defenses of it, so far as it appears in the present proceedings, involved other is-

* Present, CURTIS and SEDGWICK, JJ.

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sues and controversies than what relate simply to the relief sought by way of injunction, and it is apparent that it was defended for other reasons than simply to procure a dissolution of the injunction order. The sums paid as counsel fees by the defendant, were not incurred in obtaining a dissolution of the injunction, but in the general defense of the suit. This does not bring them within the rule established in *Coates v. Coates* (1 *Duer*, 664).

The referee does not find what the services of counsel, if any, in dissolving the injunction, were worth, nor what sums, if any, were paid for such services, nor does he find that any fees were paid them, as distinguished from the general fees paid them for services in the general defense of the suit. Neither the referee nor the court have the evidence before them, that enables them to decide what was actually paid by the defendant for services to obtain a dissolution of the injunction, and unless this does appear clearly, it seems to be settled, that the defendant cannot sustain a claim to be allowed this as damages (*Strong v. De Forest*, 15 *Abb. Pr.*, 427; *Town of Guilford v. Cornell*, 4 *Id.*, 220; *Child v. Lyon*, 3 *Robt.*, 754; *Wilde v. Joel*, 15 *How. Pr.*, 320; *Edwards v. Bodine*, 11 *Paige*, 223).

A departure from that rule might, in some cases, affect plaintiffs oppressively. There is no reason to think that it was the intention of the legislature that an unsuccessful plaintiff, because he had, as one branch of his relief, asked for an injunction, should, in addition to the payment to the defendant of the costs and allowances provided by the Code, be mulcted in the counsel fees paid in the general defense of the suit.

I concur in the views of the learned judge who made the order appealed from, and which should be affirmed, with costs to the plaintiff.

SEDGWICK, J., concurred.

BACH *against* THE PACIFIC MAIL STEAMSHIP COMPANY.

Supreme Court, Second District; Special Term, June, 1872.

INJUNCTION. —CORPORATION.

Equity will not by injunction at the suit of a stockholder in a business corporation, interfere with the general management of the corporation property,—such as the mode of investing its surplus moneys,—unless there be a clear violation of express law, or a wide departure from charter powers.*

Motion to continue temporary injunction.

James Bach, a stockholder in the Pacific Mail Steamship Company, brought this action against the company and its officers, for an injunction, upon grounds stated in the opinion.

— —, for the motion.

— —, opposed.

TAPPEN, J.—The plaintiff alleges that he is a stockholder and the owner of fifty shares of stock in the defendants' company; and he brings this action for the purpose of obtaining an injunction against the corporation, its directors and officers, in respect to the mode of investment of certain moneys, known as the surplus fund. It is alleged by the plaintiff, that this surplus fund amounts to a sum exceeding three millions of

* Compare *Joslyn v. Pacific Mail Steamship Co.*, p. 329 of this vol., and *Thompson v. Erie Railway Co.*, 11 *Abb. Pr. N. S.*, 188, and cases there cited.

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dollars; that it has been invested heretofore in government securities principally, and that the defendants' officers are now investing a large portion of it in securities of less value and of a fluctuating character; that such loans are made on call and some on time; and that the moneys are jeopardized, in respect to their security, by the mode of investment pursued by the defendants' officers, who are also brought in and made defendants in this action.

The chief questions presented are, whether the court should, by injunction, interfere to prevent certain modes of investment; whether it should direct investments in one or more ways and prohibit them in others; whether, in the absence of any prohibition or limitation of law, the directors are not invested with certain discretionary powers as the representatives of the stockholders, for the purposes of managing the affairs of the company and all of its transactions; and, finally, whether the directors may exercise this discretionary power of investment without being expressly authorized by statute in respect to the class and quality of the securities to be taken therefor. The equity powers of the court are to be exercised with great care, and particularly is this the case in respect to the granting and continuing of injunctions, and a case free from doubt on the law and the facts should be established in order to justify the exercise of this power; and where an adequate remedy is otherwise afforded by the law, either by an action for damages or by a change in the board of officers, by removal or suspension under the provisions of the statute, an injunction ought not to be resorted to.

The defendants' corporation was chartered in the State of New York, by chapter 266 of the *Laws of 1848*, for the purposes of navigation and commerce, as specified in the act of incorporation—to which was added in the first section, "all necessary and incidental pow

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er is hereby granted, and all contracts may be either verbal or with the signature of the president and secretary, and with or without corporate seal."

The eighth section authorizes the directors to appoint president and other officers and agents, and by-laws are authorized for the government of the corporation and the manner of its business; and by the fourteenth section, the corporation is to possess the general powers and privileges and is subject to the general restrictions and liabilities prescribed by the Revised Statutes in respect to corporations. Corporate bodies of this character have long been known to the law.

The Roman law created secular corporations which included companies composed of merchants embarking in commercial adventure; and the spirit of commercial enterprise aided the establishment or the preservation of great centers of trade, of people, and of business, in the towns and cities of the old world.

These commercial enterprises were at the hazard of the fortunes of those who invested in them, and great privileges and monopolies were conferred by governments to induce this hazard, in the hope that the enterprise would be successful and would thereby benefit not only those who embarked in them, but also the State and the nation.

The earliest noted instance of this character was the Bank of Venice, which was chartered as early as the twelfth century, although classes of individuals were known much earlier, who associated themselves together to engage in trade and in commercial adventures requiring large capital.

In later times, and at the present day, numerous instances are presented of great enterprises set on foot by means of an aggregation of capital which could be obtained in no other way than by means of a chartered company, and the contributions of a multitude of shareholders.

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Speaking of private corporations, Chancellor BLAND, of Maryland, says (3 *Bland Ch.*, 407): "There is no instance of the creation of any such body under the provincial government, but since the establishment of the Republic, they have largely increased."

A corporation is created and franchises are granted to promote the public interest; the shareholders accept the grant and invest capital for the purposes of legitimate profit, and they put that capital at the risk and hazard of the business. And herein there is some difference to be recognized between corporations and their capital or assets embarked in business enterprises, and a trust or trust fund, pure and simple, wherein the primary object is safety, and the secondary object profit.

The chancery or equity rules for investments of this latter character have not been usually applied to corporate bodies, whose profits depend upon their own management of their own affairs; although, where their officers or directors, under pretense of managing the business, violate any provision of law, or embark in undertakings wholly foreign to the objects of the incorporation, the court will, in such case, enforce a suitable and wholesome restraint; and in such cases, also, a complaining stockholder may invoke the action of the State through the attorney-general, for the removal or suspension of any officers or directors (*Laws of 1870*, ch. 151). And corporations, like private persons engaged in trade, must within the law be left to manage their own affairs subject to that law, and to the enforcement of those statutory rules which obtain in equity. In this case it is not alleged that there is any loss arising from the business of the company transacted in the mode complained of by the plaintiff; on the contrary, it appears that a large profit has been realized during the period of three or six months embraced in the statement submitted, and although al-

leged yet it does not appear that any express provision of law is violated.

If fraudulent or illegal acts are alleged against officers or directors, an action for damages may be maintained against them by a stockholder, in addition to the proceedings for suspension required by statute (12 *How. Pr.*, 19).

Where directors have committed a breach of trust, or by making a contract of guarantee on behalf of the corporation which they were not empowered to make by charter, or have committed other clear excess of chartered powers, they have been restrained by injunction (*Bradshaw v. Eastern Counties Railway*, 7 *Hare*, 114; *Mauders v. Commercial Bank*, 28 *Penn.*, 379).

And it is the law that directors are regarded as trustees of stockholders (*Robinson v. Smith*, 3 *Paige*, 233), and they may be called to account for waste or misapplication of corporate funds (*Cumberland Coal Co. v. Sherman*, 30 *Barb.*, 553); but in cases where there is no fraud or clear excess of charter authority, injunction will not issue, particularly where the acts done have the distinct approval of the shareholders (*Lord v. Copper Miners*, 2 *Phill.*, 741); and where an insurance company, formed for life and fire risks, sought to change their business to marine risks, the court restrained them on the application of a shareholder, on the ground that it was a business not contemplated by the charter (*Angell on Corp.*, 391).

In *Baltimore & Ohio Railroad v. City of Wheeling*, (13 *Gratt.*, 40), an injunction was refused a stockholder against the use of funds for purposes not materially different from those designed by the charter, although such expenditure might be injurious to the stockholder.

And the court refused an injunction at the suit of a stockholder, to restrain one corporation from taking stock in another corporation, such taking not being ex-

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pressly authorized by charter (*Hodges v. New England Screw Co.*, 1 and 3 *Rhode Island*) ; and in *McGregor v. Dover & Deal Railway* (16 *Eng. L. & Eq.*, 180), the question arose, whether the transaction in that case was prohibited, and not whether it was in excess of the authority given the directors ; and the case of *Treadwell v. Salisbury Manufacturing Company* is cited, where certain stockholders filed a bill to restrain a sale of all the property of the company to a new company for shares of stock to be distributed to stockholders of the old company. The court refused the injunction, and it is observed, "a limit may be put on a trading corporation by injunction, which would result in loss or destruction of its corporate property."

And an injunction was refused in the case of *State of Louisiana v. New Orleans & Jackson Railroad*, where the question was the manner of making a lease of the property of the company, pursuant to the vote of the directors. No fact being alleged showing a violation of law or any provision of the charter, or of the acquired rights of any party, the court, in the absence of any prohibition or regulation, would not interfere to control the manner in which the act was to be performed.

All corporations capable of taking and holding property, have the "*jus disponendi*" as fully as natural persons, except so far as they are restrained by law (*State of California v. College of California*, 38 *Cal.*, 166).

In the case at bar the defendants are a private corporation, and their codefendants are officers and directors thereof. The charter is conferred by law for the purpose of enabling the grantee to engage in trade and commerce. Like all corporations it is the creature of public policy and of statute, and although, in law, a private, it may in one sense be termed a public corporation. The stock is owned by individuals, but the franchise and its use are public. The acts of a corpora-

tion are with a view to the interests of the shareholders, but they are also expected to promote the public interests (*Angell on Corp.*, § 32). And two great purposes are intended to be aided in these respects :

1. The active and useful employment of capital ; and,
2. The promotion of trade, commerce, manufactures, and other legitimate objects.

The proposition of law on the part of the plaintiff may be assented to without touching the case, but no case can be found where the general management of corporate property has been subject to the restrictions of judicial power ; unless, indeed, in the case of a clear violation of express law, or a wide departure from chartered powers ; but such is not the case at bar ; and the very great difficulty of an appropriate remedy by injunction, without at the same time subjecting the corporation to restrictions and losses which would terminate its career, must be apparent to all.

The plaintiff has not made out a case for the intervention of the court, and if he sustains damages by the illegal acts of the directors, he has, as before shown, an adequate remedy at law.

Let an order be entered denying the motion to continue the temporary injunction, and dissolving such injunction, with costs.

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MANN *against* THE NEW YORK CENTRAL, &c.
RAILROAD COMPANY.

*Supreme Court, General Term; Fourth Department,
June, 1872.*

ACTION FOR PENALTIES.—INTEREST ON DEBT.—MOD-
IFYING JUDGMENT.—CONSTRUCTION OF JUDG-
MENT OF APPELLATE COURT.

Where a judgment for a debt and interest, — *e. g.*, for several penalties, — is reversed as to part of the debt, it must be deemed reversed as to the interest on such part.

The statute allowing interest to be taxed as costs, does not entitle the plaintiff to retain his judgment as to the interest, after it has been thus modified in respect to the principal recovery.

The supreme court have power to construe a decision of the court of appeals in accordance with these principles, and to direct the execution to be enforced accordingly.

Motion to set aside execution.

William J. Mann sued the New York Central & Hudson River Railroad Company, in the supreme court, to recover a large number of penalties against the defendant, for demanding and receiving illegal fare for riding on its cars between Buffalo and Tonawanda, and recovered judgment for one thousand nine hundred and four dollars and fifty-nine cents for penalties and illegal fare, and one hundred and twenty dollars and thirty-six cents costs. The costs included thirty-four dollars and thirty-six cents for interest on the sum awarded to the plaintiff from the date of the decisions to the entry of the judgment.

A judgment in a similar case was affirmed by this court and carried to the court of appeals. That court

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reversed it as to all the penalties except one, and affirmed it as to one penalty, together with the illegal fare and the costs in this court (reported in 46 *N. Y.*, 644). This court, at a general term in January, 1872, modified the judgment in this action by conforming it to the decision of the court of appeals in the other action.

An execution was issued on the judgment as modified, for the penalty, illegal fare, and the whole amount of costs in this court. The defendant offered to pay the costs as taxed, after deducting therefrom the amount of interest taxed on the penalties, as to which the judgment was reversed; and the plaintiff, refusing to make such deduction, the defendant now moved to set aside the execution upon payment of the amount so offered to be paid.

J. M. Willett, for the motion;—Insisted that inasmuch as the judgment had been reversed as to penalties, except as to one penalty, interest ought not to be allowed to be collected except as to one penalty as to which the judgment was affirmed.

G. W. Cothran, opposed.—I. The judgment was only reversed as to penalties, and it was “affirmed as to one penalty, and the costs included in the judgment in the court below;” in other words, *the judgment was affirmed in all things* except as to all penalties in excess of one. By the explicit language of the decision of the court of appeals, in every other respect than as to the penalties in excess of one, the judgment was affirmed. This decision included the sum now sought to be stricken out or disallowed.

II. This interest was taxed and entered in the judgment as costs. If it became a part of the costs when taxed, then the judgment as to the costs having been distinctly affirmed, this sum should not be inter-

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ferred with. It became part of the costs. It certainly was no part of the damages. Not being "damages," it must be "costs," as there are only damages and costs in the judgment. The disbursements when adjudicated, became part of the "costs" as contra-distinguished from the "damages." This interest was taxed under 2 *Laws of 1869*, ch. 807, p. 1890, which reads: "§ 3. It shall be lawful for any party to a suit, who shall have obtained a verdict or a report of referees in his favor, to *tax interest* upon the amount of such verdict or report *as costs*, from the time of the obtaining of the same to the time of perfecting judgment therein." To deprive the plaintiff of this part of his costs is simply to override this plain statutory provision. Both the statute and the decision of the court of appeals are in favor of the plaintiff.

III. This motion should have been made at the special term.

BY THE COURT.—MULLIN, J.* —The motion should have been made at the special term.

The only motions that can properly be made at the general term in the absence of some statutory requirement or of a rule of the court, are such as relate to proceedings in the general term, such as prescribing the time and manner of transacting its business, the opening of defaults and vacating, modifying or amending rules and orders entered by its direction, and the proceedings for contempts committed in its presence, and proceedings to punish attorneys and other officers for misconduct in office.

There may be and there probably are other cases besides these in which motions may be made in the general term, but if there are, they do not embrace a motion like the one before us.

* Present, MULLIN, P. J., JOHNSON and TALCOLT, JJ.

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But we have the power to hear it, and having heard it, we will decide it, protesting, however, against the case being made a precedent which shall bind us to entertain any similar motion.*

It is manifest that the plaintiff has no right to interest on the penalties as to which the judgment has been reversed, except what may result from the literal interpretation of the decision of the court of appeals.

It is equally manifest that the court of appeals never intended to give the plaintiff such interest. To give it would be both unjust and illegal.

Interest is the compensation given by law to the party entitled to a sum of money for its detention by the debtor, after the time of payment has arrived. It is an incident to a debt, and where there is no debt, there is no interest. When the judgment was reversed as to part of the penalties, the right to interest on such part ceased; and no court has power to require the payment of interest where there is no debt, unless it be as a condition for granting a favor to the person to whom the favor is granted.

I have no doubt but that the judgment of the court of appeals allowing such interest, would be reversed by a court authorized to review it; but there is no such court, nor is it necessary there should be, to enable us to prevent the injustice attempted in this case.

After a verdict is rendered, there is no power in the

*His Honor was under a misapprehension in respect to the previous proceedings. This particular case never was in the court of appeals; on the contrary, the judgment of the circuit was modified at a previous general term of this court, held at Buffalo, in January, 1872, in accordance with the decisions reported in 46 *N. Y.*, 644. This motion was for a construction of the general term's own judgment, and hence was properly made at the general term, within the rule just laid down by the learned judge. The motion was noticed for a special term, and the special term ordered it to stand over and be heard at a general term. This note is made by the counsel for both parties.

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court to increase or lessen it. There is no way in which the party in whose favor it is rendered can recover interest on it between its rendition and the entry of judgment, unless it is included in the costs; and hence the courts, to prevent the injustice of depriving a party recovering a verdict of interest while the defendant is reviewing the proceedings on the trial, permitted such interest to be taxed, with the costs (*Vredenburg v. Hallet*, 1 *Johns. Cas.*, 27; *People v. Gaine*, 1 *Johns.*, 343; *Lord v. Mayor, &c. of New York*, 3 *Hill*, 430, note a).

In 1844 the legislature passed a law (*Laws of 1844*, ch. 324), by section 2 of which it was provided, that the party in whose favor a verdict was rendered or report of referees made, might tax interest upon the amount of such verdict or report as costs, from the time of obtaining the same to the time of perfecting the judgment therein.

This provision is incorporated in the Code, and is section 310 of the statute.

Although the interest is inserted in the bill of costs, it is not thereby made costs. Costs are defined by section 303 of the Code as compensation allowed to the prevailing party by way of indemnity for his expenses in the action. It is this allowance made to the plaintiff in the supreme court that the court of appeals held the plaintiff entitled to, together with the interest on the single penalty, as to which judgment was affirmed.

The plaintiff not being entitled to the interest on the penalties as to which judgment was reversed, the decision of the court of appeals should not be so construed as to give it, unless it is susceptible of no other interpretation.

It is doing no violence to the language of the decision to construe the word costs, as meaning that portion of the amount embraced in the bill of costs which are commonly known as attorney's costs.

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This was unquestionably the sense in which it was used by the court.

It is said this construction would deprive the plaintiff of the interest on the penalty to which he was held entitled. The answer is, that his right to the interest on that penalty does not rest on the decision of the court, but upon the statute.

The court could not give the plaintiff any right to interest after deciding he had no legal right to the principal.

Let an order be entered that the sheriff, upon payment to him of his fees and the amount due on the execution, except the interest on the penalties as to which the judgment was reversed by the court of appeals, return the same satisfied, and the clerk enter satisfaction of the said judgment of record, without costs to either party.

DOLE *against* THE NEW YORK CENTRAL, &c.
RAILROAD COMPANY.

Buffalo Superior Court ; Special Term, July, 1872.

SHERIFF'S FEES. — MODIFICATION OF JUDGMENT.

If, after the levying of an execution under a judgment, the judgment on appeal be modified by reducing it in amount, the sheriff is only entitled to collect his fees on the amount of the judgment as modified, even though he has never released his original levy.

Motion to have execution returned satisfied.

Daniel E. Dole sued the New York Central & Hudson River Railroad Company in the Buffalo superior
N.S.—XII.—25.

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court ; and about the same time twenty-five other similar actions were instituted, to recover several penalties of fifty dollars each for alleged violations of the "Act to prevent extortions by railroad companies" (*Laws of 1857*, ch. 185), and also to recover the excess of fares paid by the plaintiffs.

Judgments were entered in each action in favor of the plaintiff, and for more than one penalty in each, and also for costs. The judgments were affirmed at the general term, and thereupon executions were issued to the sheriff of Monroe county, who levied upon personal property of the defendants sufficient to satisfy the same, and which still remains subject to the levy and is held by him under the same executions.

The defendants appealed from all of said judgments to the court of appeals, and proceedings under the levy were suspended by virtue thereof, but no order was made discharging the levy. The court of appeals decided that the judgments were erroneous, and ordered that they be reversed except as to one penalty in each case, and the excess of fares paid, and affirmed each judgment as to one penalty and the excess of fares paid and the costs included in the judgments below, which determination was made the judgment of this court ; and thereupon the plaintiff's attorney gave notice to the sheriff of such modification of the judgment and that all he was required to collect by virtue of the said execution, was the one penalty and excess of fare in each suit, and also the costs of the various judgments and interest, all of which were given in detail ; and, further, "*such fees as he was entitled to by law.*" In order to procure a discharge of the judgments, the defendants offered to pay to the sheriff, upon the execution, all amounts he was required to make by the modification of the judgments, and such fees and poundage as he would have been entitled to had the executions originally required him to make

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only such amounts. The sheriff refusing to receive the same, and demanding poundage upon the amount for which the execution had been issued and levies made, and which was nearly fifty thousand dollars more in the aggregate than the amount as modified, and threatening to collect by sale, the defendants make this motion to compel him to return the executions satisfied, on payment being made according to its offer.

J. M. Willett, for the motion.

W. F. Cogswell, for the sheriff, opposed.

H. R. Squier, for plaintiff, Dole.

George W. Cothran, for plaintiffs in twenty-five other cases.

SHELDON, J. —When an execution against property, regular upon its face, is placed in the hands of a sheriff with directions to levy, it is his duty to proceed against the property, to reduce it to possession, to protect it and offer the same at public vendue as required by law, and from the proceeds to satisfy the exigency of the writ. For his services in the matter he is allowed a statutory compensation, which is to be paid from the fund, and which is as much a part of the amount he is allowed and required to collect, as the judgment itself. In his proceedings he is acting for the plaintiff and subject to his direction; regard being had, however, to the rights of the execution debtor, and that he shall not be unnecessarily affected.

The plaintiff may withdraw the execution or authorize delay to be granted, or may compromise or satisfy the judgment, but as to the fees of the sheriff, who is an officer executing the process of the court, he will be protected against an attempt to defraud him of his

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compensation in cases of collusion where the plaintiff and his attorney are irresponsible (*Jackson v. Anderson*, 4 *Wend.*, 474).

The plaintiff, by the act of issuing the execution, claims to the officer that it is regular, legal, and founded on a legal judgment. If there are any doubts upon those questions, it is for him to solve them, not the sheriff. If the execution is set aside after levy, as irregular, the whole proceeding falls, and the fees of the sheriff are not collectable of the defendant nor to be satisfied out of the levy.

In these cases, the judgments appealed from and upon which the executions were issued, were declared to be erroneous to a certain extent, and were, so far, reversed, but were affirmed for an amount certain. Beyond the sum for which they were affirmed, they were illegal, and erroneous, and the defendant was absolved from all claims and consequences and incidents that had been adjudged or predicated against it by reason of, or founded upon, the illegal or erroneous judgments. The defendants had no part in the issuing of the process or in the proceedings of the sheriff; it was resisting it all and was compelled to appeal to the court of last resort to have it determined that the judgments were erroneous. As soon as that determination was made the judgment of this court, the judgment became modified, and vital only for the amounts which the defendants have offered to pay. Such, in judgment of law, should have been the original judgment of this court, and the executions should have been issued accordingly.

I can see no principle or reason for the claim that the sheriff should be allowed to make his poundage from the defendant upon the whole amount of the judgments. Should he be allowed to collect from the defendants his fees upon an amount which should never have been awarded to the plaintiffs? If so, a mo-

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ment's reflection will enable one to see how erroneous the injustice which might be perpetrated by such a proceeding under color of authority against an innocent defendant.

After a levy has been made, the sheriff is entitled to his poundage, whether he collect by vendue or the amount is voluntarily paid by the judgment debtor. The authorities all concur in this, and the construction of the statute of 1871 (1 *Laws of 1871*, 821, ch. 415) seems to be well settled by the former adjudications upon the analogous statutes (1 *Caines*, 192; *Bolton v. Lawrence*, 9 *Wend.*, 435; *Parsons v. Bowdoin*, 17 *Id.*, 14).

It is unnecessary to consider the claim of the sheriff, if he has any, as against the plaintiffs or their attorney, as they are not involved in this motion, and this court has no power to adjudicate here between them; he must take such remedy as he is advised he is entitled to, and which will depend upon the responsibility of the parties; and the return of the execution satisfied, in pursuance of the orders now granted, should not in any manner prejudice his proceedings by motion or action, if he concludes to resort to either.

ROWE against STEVENS.

New York Superior Court; General Term, April, 1872.

VERDICT AGAINST EVIDENCE.—NEW TRIAL.

If defendant omits, at the trial, to ask a dismissal of the complaint, expressly on the ground that the evidence is insufficient to justify a verdict, or to ask a direction that a verdict be given in his favor, he cannot, after verdict against him, sustain a motion on the judge's minutes for a new trial, on the mere ground that the evidence was insufficient, unless the verdict was clearly contrary to evidence.

*See Statute,
New York, 324.*

*Following
44 Nov. 199.*

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Where there is a real conflict of testimony among the witnesses, and there is sufficient evidence upon which the jury may find for the plaintiff, their verdict will not be set aside, even though the court, on the same testimony, would have decided differently.

Appeal from an order granting a new trial.

James Rowe sued Salmon S. Stevens, in the New York superior court, to recover the usual broker's commission for services rendered by plaintiff to defendant, in finding a purchaser for fifteen lots of land owned by defendant.

The defendant denied such employment, and the rendition of services for defendant, at defendant's request, and claimed that plaintiff was employed by other persons than the defendant,—namely, by Winters and Hunt,—to bring about an exchange of some of their property for said lots; that he did effect such exchange, but that his services in that respect were rendered to said Winters & Hunt, who paid the plaintiff the usual broker's commission and fees therefor.

Upon a trial before the court and a jury, evidence was introduced by both parties, and at the close of such evidence, defendant's counsel moved to dismiss the complaint, on the ground that a broker cannot take a commission from both parties.

The motion was denied, and defendant excepted.

The judge charged as stated in the opinion, and plaintiff had a verdict for nine hundred and fifty dollars.

Defendant moved to set aside the verdict as contrary to evidence. The motion was granted and the verdict set aside and a new trial ordered, with costs to abide the the event.

Plaintiff appealed to the court at general term.

Chauncy Shafer and *C. H. Truax*, for plaintiff, appellant.—I. The plaintiff was entitled to recover (Pugs-

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ley v. Murray, 4 *E. D. Smith*, 245; Dunlop v. Richards, 2 *Id.*, 181).

II. The party non-suited, or against whom a verdict is ordered, is upon appeal entitled to have every doubtful fact found in his favor (*Colegrove v. N. Y. & N. H. R. R. Co.*, 20 *N. Y.*, 492; *Hart v. Erie Railway Co.*, 3 *Albany Law J.*, 312).

III. The charge to the jury was not excepted to, and was very explicit in its statements of the law. The jury was instructed, that before they could find for the plaintiff, they must find that plaintiff informed both parties to the transaction, that the other party was to pay him a commission, and as there was no evidence on that point, the supposition is they did so find, and the finding of a jury on a question of fact is conclusive (1 *Grah. & W. on New Trials*, 362; 2 *Arch. Pr.*, 222; *Gra. Pr.*, 314; see, also, 1 *Grah. & W. on New Trials*, 380).

IV. A verdict should not be set aside, merely because the court would have come to a different conclusion from that of the jury, on the force and weight of the testimony (*Mackey v. N. Y. Central R. R. Co.*, 27 *Barb.*, 528; 3 *Grah. & W. on New Trials*, 1239, 1321). And the verdict should be sustained by the court, if the evidence by any fair construction, will warrant such a finding (3 *Grah. & W.*, 1239; *Conklin v. Thompson*, 29 *Barb.*, 218; *Heritage v. Hall*, 33 *Id.*, 347; *Best v. Starks*, 24 *How. Pr.*, 58; *Sheldon v. Hudson River R. R. Co.*, 29 *Barb.*, 226; *Fry v. Bennett*, 9 *Abb. Pr.*, 45; 27 *Barb.*, 540; 29 *Id.*, 491, 504; *Heritage v. Hall*, 33 *Barb.*, 347; *Coddington v. Carnley*, 2 *Hill.*, 528).

Ira D. Warren, for defendant, respondent.

BY THE COURT.* — FREEDMAN, J.—The learned

* Present, BARBOUR, Ch. J., FREEDMAN and SEDGWICK, JJ.

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judge presiding at the trial charged the jury in effect that, although as a general rule a broker cannot act for both parties, and collect a fee from each, yet there may be circumstances under which he may rightfully be employed by both parties to do a joint service upon the agreement to be paid equally by them, but that this must be fully understood.

He left it to the jury to find whether the case, according to the evidence, did or did not come within the exception referred to, and charged them that, before they could render a verdict for the plaintiff, they had to find from the evidence, as a fact, not only that defendant employed plaintiff, but also that it was understood by all parties interested,—Hunt and Winters on the one side and the defendant on the other,—that plaintiff was to act as a broker for both sides, and to be paid accordingly.

The defendant, who had previously and unsuccessfully moved for a dismissal of the complaint on the sole and specific ground that a broker cannot take a commission from both parties, did not request the court to charge otherwise, and took no exception to the charge as made. Consequently he acquiesced in it, and the charge, as delivered, must be assumed to embody the true rule of law applicable to defendant's case, upon the present appeal by plaintiff.

The only question, then, before us is, whether the court below erred in setting aside the verdict. The motion was made on the judge's minutes. Section 264 of the Code prescribes three distinct grounds upon which the judge who tries the case may entertain such motion, namely :

1. Upon exceptions ;
2. For insufficient evidence ; and,
3. For excessive damages.

The defendant moved upon the sole ground that the

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verdict was contrary to evidence, and unless it was clearly so the motion should have been denied.

Upon an examination of the proceedings had upon the trial, we find that when plaintiff rested, no motion was made by defendant for a dismissal of the complaint for the reason that plaintiff had failed to prove a cause of action, and that at the close of the evidence on both sides the defendant again omitted to move for such dismissal or the direction of a verdict in his favor, upon the ground of the insufficiency of evidence to sustain a verdict against him. The defendant, therefore, by not objecting to submit the case to the jury upon the questions of fact involved therein, concluded that there was sufficient evidence to carry the case to the jury, and he consented to a decision of these questions by that tribunal.

Having taken his chance of a favorable verdict, which would have concluded the plaintiff upon the facts, and there being a clear conflict of testimony between the parties, who had appeared as witnesses on their own behalf, the defendant should not afterwards have been permitted to allege that the verdict is without evidence, or insufficiently supported by evidence, and, for that reason, against law (*Barrett v. Third-avenue R. R. Co.*, 45 *N. Y.*, 628).

Moreover, it appears that there really was sufficient evidence to authorize the jury to find as they did ; and the case, therefore, belonged to a class of cases in which the rule is that the court will not set aside the verdict merely because the court is of the opinion that it would have come to a contrary conclusion upon the same evidence.

The policy of the law is not only to do justice between the parties, but also to end the legal strife after each of them has had a reasonable opportunity for the full presentation of his side of the case.

The law, therefore, prescribes certain forms accord-

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ing to which justice is uniformly administered, and very wisely holds that during the progress of an action, certain benefits can be claimed, and secured, only in a certain form and at a particular stage of the proceeding, and are waived unless so applied for.

In many instances a party has his free choice, which, however, when made, will bind him to abide by it with all its consequences. By electing one mode for the assertion and investigation of his rights, he is deemed to have waived the others, which are inconsistent therewith. If the practice were otherwise, litigation would be undeterminable. According to these fundamental principles, there is neither injustice nor hardship in holding a defendant who has, either carelessly or designedly, seen fit to omit making his motion, concluded upon the facts established by the verdict of the jury.

The order appealed from should be reversed, with costs.

BARBOUR, Ch. J., and SEDGWICK, J., concurred.

THE SCHOHARIE VALLEY RAILROAD CASE.

*Supreme Court, Third District; Special Term,
July, 1872.*

CORPORATION.—SETTING ASIDE ELECTION.—NOTICE
OF APPLICATION.—STOCK-BOOK.

On an application under 1 *Rev. Stat.*, 603, § 5,—giving the supreme court power to review elections in private corporations,—notice to the persons who claim to have been elected, and to the corporation, is sufficient. It is not necessary that all the stockholders have notice of the application.

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Where the directors of a corporation are deprived of possession of the stock-book of the company, it is proper for them to open a new one, making it a copy as far as possible of the old. In such a case the inspectors of an election may properly refer to the new stock-book to ascertain who are voters; but, if the old book be produced, the record therein must govern in reference to transfers recorded there before the new book was opened.

Application by Samuel B. Stevens, to have an election of six directors in the Schoharie Valley Railroad Company set aside.

The facts are stated in the opinion.

Mr. Smith and *Mr. Moak*, for the applicant.

Mr. Mayham and *Mr. Krum*, opposed.

Chauncey Hinman, for the railroad company.

LEARNED, J.—This is an application under 1 *Rev. Stat.*, 603, § 5 (marginal page), *et seq.* The first objection made, in opposition, is that the statute which requires notice “to the adverse party or to those who are to be affected” renders it necessary that all the stockholders should be notified. But I do not think that is a reasonable construction. It is true that in some sense every stockholder might be affected by the ordering of a new election. This proceeding is, however, somewhat analogous to a writ of *quo warranto*, and I think that the persons to whom notice is to be given are the persons to whom such a writ could be directed, viz: the persons who claim to have been elected and the corporation.

The facts in this case are briefly as follows:

Previous to the election of the six directors of this company in June, 1871, one William D. Gebhard had been secretary of the company and had had, as such secretary, possession of the stock-book. At that election certain directors were chosen, who elected one

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Almerin Gallup as secretary in the place of Gebhard. After the election of Gallup as secretary, Gebhard refused to surrender to him the stock-book and the stock transfer book. Thereupon these directors proceeded to make a new stock-book and stock transfer book, and directed their secretary to place the names and number of shares of stock held by each person, and to enter all transfers of stock thereon, and directed that thereafter said new stock-book should be the stock-book and stock transfer book of said company.

In refusing to surrender the old stock-book Gebhard had the approbation of the present applicant. At the election in June, 1872 (the election complained of), Gallup, then the secretary of the company, produced the new stock-book and Gebhard produced the old stock-book, and both lay on the table during the election. There was no dispute or doubt that the stock-book produced by Gebhard had been the stock-book of the company up to the time of making a new book as aforesaid. And there was no doubt that it still continued to be a stock-book of the company, unless the making of the new book deprived it of that character. The inspectors of election decided to regard the book produced by Gallup as the stock-book of the company and to be guided by it; and they disregarded utterly the book produced by Gebhard.

After the polls were closed, the inspectors declared that the so-called "Root" ticket had 235 3-7 votes, and the so-called "Vroman" ticket, 233 4-7, and that the persons on the "Root" ticket were elected. The applicant was on the "Vroman" ticket.

It appears to me that, when the board of directors found themselves unable to get possession of the old stock-book, they acted properly in preparing a new one as accurately as they could. Such would have undoubtedly been their duty, in case the old stock-book had been destroyed by fire. And I think that from the

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time when the directors had prepared and adopted this new book it became the proper place for entering subsequent transfers of stock. To illustrate: If the stock-book of a company should become full of entries, the company would properly procure a new one and transfer the balance from the old to the new. From that time forward, transfers would be made in the new book.

But the point in which I think the inspectors erred (and erred very naturally) is this: The old book did not cease to be a stock-book of the company on the making of a new one. An old ledger of a merchant is his ledger still, although the accounts are transferred to a new book; and when any conflict appears between an account in the old book and an account as transferred into the new, the former is the original and the latter but a copy. The inspectors were right therefore in using the new book, but they were wrong in rejecting the old. Before the new book was made, the old was undoubtedly the stock-book of the company. It did not lose that character because it was unlawfully withheld. The new book was an attempt to make, as far as possible, a copy of the old. The attempt was proper: but the copy could not supersede the original. Transfers subsequently made in the new book were, however, original, and not a copy.

To apply these principles: Willis Van Wagenen had one share of stock, as appeared on the old stock-book. It is not disputed that he owned that share. His proxy was tendered and a vote for the "Vroman" ticket offered. But it was rejected solely on the ground that this share did not appear on the new book. but certainly, if either accidentally or intentionally, his name was omitted in making out the new book, such omission did not deprive him of the right to vote. I think his vote should have been received.

The same remark applies to the case of Daniel Warner, who held one share and whose vote was rejected

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on the same ground. It is true that the opposing affidavits allege that he had assigned his stock, but it had not been transferred (1 *Rev. Stat.*, marg. p. 604, § 6; *In re Cecil*, 36 *How. Pr.*, 477). Six shares stood in the name of Tobias Bouck, and a proxy signed by him and one signed by his assignee in bankruptcy was offered; a vote tendered for the "Vroman" ticket and rejected for the same reason—that his name did not appear on the new book. In this case, also, the opposing affidavits allege that his stock had been hypothecated. But the stock still stood in his name. He, therefore, or his assignee in bankruptcy, was entitled to vote. So, also, the executors of Peter Osterhout, senior, were entitled to vote on his five shares.

Jacob Vroman had on the old stock-book fifty-two shares, and had had this stock for several years. On the new stock-book he had only forty-two. It appears he had not transferred the ten shares to any person. Mr. Gallup, the secretary, states that he made in the new book an entry of the names of all persons who voted at the election in 1871. Jacob Vroman swears that he had voted on these fifty-two shares at every election since 1868, except that of 1872. In regard to the election of 1871, it should, however, be said, that Mr. Gallup swears that Mr. Vroman did not vote at that election.

Probably in making up the new stock-book, an accidental error was made in entering his stock at forty-two instead of fifty-two shares.

The opposing affidavits, aver, indeed, that ten of these shares were illegally issued to him in 1867 or 1868. But it is plain that the inspectors did not examine this question of illegality; and plainer still they would have had no right to do so. Certainly the board of directors, even if they had intended it, could not strike out the shares of stock belonging to a stockholder. Unless *he* transfers his stock, it remains.

People *ex rel.* Furman v. Clute.

No question as to the legality of the shares was raised at the election; and no such question can be tried here. The inspectors should have allowed him to vote on fifty-two shares. I think also, that the inspectors erred in receiving a vote on the George Lasher stock. Lasher was dead and the proxy was signed, not by the executors or administrators, but by his heirs and next of kin. It appears to me, therefore, that the election of Orson Root and others, must be set aside, vacated and annulled.

The statute authorizes the court to order a new election, or to make such order and to give such relief in the premises as right and justice may require. Possibly the court might declare the other ticket elected. But I think it better to order a new election.

Ordered accordingly.

PEOPLE *ex rel.* FURMAN against CLUTE.

*Supreme Court, Special Term, Fourth District;
March, 1872.*

CONTESTED ELECTION.—CHARTER OF SCHENECTADY.—
MISCIATION OF REVISED STATUTE.—DISQUAL-
IFICATIONS FOR PUBLIC OFFICE.—BALLOT
FOR DISQUALIFIED PERSON
DISREGARDED.

Under the *Laws of 1829* (ch. 352, p. 538), and the *Laws of 1853* (ch. 80, p. 115), one who is a supervisor at the time of an election for a superintendent of the poor, is disqualified for the latter office; and cannot be elected. His subsequent resignation does not remove the disability.

*Modified
to Part 356.
42 Hon. 157.*

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By the charter of Schenectady, the supervisor of a ward in that city is subject to the same disqualification as supervisors of towns.

A provision of the Session Laws forbidding any supervisor to be *appointed* a superintendent of the poor, was inserted in editions of the Revised Statutes later than the first, and numbered as if a part of the Revised Statutes.—*Held*, that an act amending it, referring to it by such numbering, was effectual, although the legislature had never recognized the provision as a part of the Revised Statutes.*

A statute disqualifying a class of persons from being appointed to an office, may be construed to disqualify them from being *elected* to it, after the office is made elective instead of appointive.

Acts disqualifying certain public officers from being chosen to fill other designated offices, are not unconstitutional.

In ordinary public elections in this State, votes cast for a candidate who, the electors have notice, is absolutely ineligible, are disregarded; and if he had the highest number of votes, the candidate having the next highest number is elected. If the electors had no notice of the disqualification, a new election must be had.

In a popular election, the voters at large are not presumed to know a disqualification of their candidate resulting from his holding another and local office; and even if the constituency of such local office could be presumed to have notice, their votes cannot be separated and rejected on that account. If all the electors voting for the ineligible candidate did not have actual or presumptive notice of the disqualification, the election is wholly void, and a new election must be had.

Action to oust defendant from the office of superintendent of the poor.

This action was brought by the People on the relation of Henry A. Furman (the relator being also joined as co-plaintiff), against Harrison Clute, to oust the defendant from the office of superintendent of the poor of the county of Schenectady, and to install the relator in his place.

The relator and the defendant were opposing candi-

* Several grosser miscitations occur in amendatory acts; and the case in the text seems to be an authority for applying the amendment according to its subject matter, in preference to the number and section.

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dates for the office of superintendent of the poor, at the general election in November, 1871. The defendant received the greater number of votes ; the totals being as follows :

For <i>Clute</i> ,.....	2448
“ <i>Furman</i> ,.....	2228
Total,.....	4676

At that election, the fifth ward of the city of Schenectady constituted one election district, and the vote therein was as follows :

For <i>Clute</i> ,	296
“ <i>Furman</i> ,.....:	275
Total,.....	571

At the charter election of the city of Schenectady in April, 1871, *Clute* had been selected supervisor for the fifth ward, and by the electors of that ward. He accepted the office and discharged its duties until December 14, 1871, when he resigned.

Clute received the certificate, filed his bond and took the oath, and January 1, 1872, entered into the office.

Furman also filed his bond, took the oath, and claimed the office ; but being unsuccessful in getting it, this action was brought.

E. W. Paige and *R. J. Thomson*, for plaintiff.—
I. By *Laws of 1853*, ch. 80, it is enacted that “no supervisor of any town, or county treasurer, shall be elected or appointed to hold the office of superintendent of the poor.” By *Laws of 1862*, ch. 385 (charter of the city of Schenectady), it is enacted (tit. 4, § 8), that “the supervisors provided to be elected or appointed under this act, shall be subject to all the provisions of law now applicable to those officers respectively, in the several towns of the State, except as limited by this act or as shall be in-

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consistent therewith." *Clute's* election was therefore void (*Shear v. Robinson*, 16 *Shep.*, 541; *Newman v. Justices*, 6 *Humph.*, 41; *Searcy v. Grow*, 15 *Cal.*, 117; *Waldo v. Wallace*, 12 *Ind.*, 570).

II. *Furman* was elected. The rule is, that where electors vote for an ineligible candidate with knowledge of his ineligibility, their votes are void; and the candidate having the next highest number of votes is elected (*Queen v. Boscawen* [1735]; *King v. Withers* [1735], and *Taylor v. Mayor of Bath* [1742] [3 *Luders*, 324], cited in *King v. Monday*, *Cowp.*, 530-537; *Oldknow v. Wainwright* [1760], 2 *Burr.*, 1017; *Wilkes' Case*, see P. S. to Letter 19 of *Woodfall's Junius*; *King v. Hawkins* [1808], 10 *East*, 211-216; affirmed 2 *Dow.*, 124; *King v. Parry* [1811], 14 *East*, 550; *Claridge v. Evelyn* [1821], 5 *B. & A.*, 86; *Gosling v. Veley* [1859], 7 *Q. B.*, 437; *Corbett & Dan. Election Cas.*, p. 8, note, pp. 186, 187; *Grant on Corp.*, 207, 208; *Hatcheson v. Tilden*, 4 *Har. & McH.*, 279; *Gulick v. New*, 14 *Ind.*, 97; *Carson v. McPhetridge*, 15 *Id.*, 331; *People v. Carrique*, 2 *Hill*, 93-97; *Hammond v. Herneck*, 1 *Cont. Elect. in Cong.*, 287; *State v. Swearingin*, 12 *Geo.*, 23; *Opinion of Justices*, 38 *Me.*, 597; *State v. Smith*, 14 *Wis.*, 498). The electors of the fifth ward had notice that *Clute* was disqualified (*Gosling v. Veley*, 7 *Q. B.*, 439; *Hatcheson v. Tilden*, 4 *Har. & McH.*, 279; *Gulick v. New*, 14 *Ind.*, 93; *Carson v. McPhetridge*, 15 *Id.*, 331; 9 *Cl. & Fin.*, 251; 11 *A. & E.*, 223; *Grant on Corp.*, 207; 2 *Show.*, 300; *Biddle v. Willard*, 10 *Ind.*, 68; *Corbett & Dan. Election Cas.*, 186, 187; *Rex v. Foxcroft*, 2 *Burr.*, 1017-1021; *King v. Hawkins*, 10 *East*, 211). *Furman* was elected by simple force of the statute (Sir *W. Blackstone* in P. S. to Letter 19 *Woodfall's Junius*).

J. S. Landon, for defendant.—I. *Clute's* election

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was valid. Chapter 80 *Laws of 1853*, reads as follows: "Section 2, of chapter 20, of title 1, of the first part of the Revised Statutes, fourth edition, is hereby amended so as to read as follows: '§ 2. No supervisor . . . of any town shall be elected . . . to hold the office of superintendent of the poor.'" The Revised Statutes were not thereby amended, for the reason that no such Revised Statutes existed. The law sought to be amended forms no part of the Revised Statutes, and never did. *Laws of 1829*, chapter 352, which provided that no supervisor shall be *appointed* superintendent of the poor, never formed part of the Revised Statutes, and was not amended because not referred to. The act of 1853 shows an intention to amend a pre-existing law, not to evade a new law. "The Revised Statutes" (4 ed.), is a private compilation of two gentlemen; their interpolations of other matter into the text of the Revised Statutes could not give interpolation legislative sanction. The amendment of 1853, therefore, falls, because there is nothing for it to amend (Hubbard *v.* Johnstone, 3 *Taunt.*, 177). The defendant was not ineligible, for the reason that he was not a supervisor of a *town*, but of a *ward* of a city. The act of 1853, being a disabling act, must be construed strictly; and the defendant not falling within the letter of the act, does not fall within the act itself (1 *Blacks. Com.*, 92; *Potter's Dwarrris*, 246). The maxim "*expressio unius est exclusio alterius*," applies. The charter of Schenectady is manifestly only intended to define the duties of supervisors of the city. It is equivalent to saying, *that in the performance of their duties*, the city supervisors shall be subject to all provisions of law applicable to supervisors of towns. It is, at least, a matter of reasonable doubt, and the defendant is entitled to the benefit of that doubt (Chase *v.* N. Y. Central R. R., 26 *N. Y.*, 523; *Potter's Dwarrris*, 245, note, 251, 255). *Laws of 1853*, ch. 80, and *Laws of 1829*, ch. 352, are unconstitutional. One

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legislature has no right to impose a qualification for office, because by so doing, it restricts the right of the elector to select and vote for a candidate from the whole body of electors, which is guaranteed by the constitution Art. 2, § 1 (*Barker v. People*, 3 *Cow.*, 686). Limitations upon eligibility to office are prescribed by the constitution itself (Art. 4, § 2; Art. 5, § 2; Art. 6, § 15; Art. 3, § 7). What the constitution permits, the legislature cannot deny. The power of the legislature to interfere with suffrage, is derived from the constitution, and is limited to the cases given in Art. 2, §§ 2 and 4. It is clear that it was the intention to place the right of suffrage above and beyond legislative interference. The right of suffrage lies at the foundation of the government, and the constitution did not confer it but secured it. But if the legislature may deny eligibility to one, it may to many, and thus the elector would, in effect, be deprived of the right "to vote for all officers elective by the people." For of what value is the constitutional right to vote, if the legislature may so restrict and hedge it about, as in effect to deny to the elector freedom of choice?

Paige, in reply.—I. *Laws of 1853*, ch. 80, is a valid act. The "Revised Statutes" (4 ed.), was composed of nothing but laws in force; an amendment of it was, therefore, an amendment of a law; and it has been adopted and ratified by repeated amendments of this kind. *Laws of 1853*, ch. 80, is a valid law, enacted by the constitutional authorities. It amends the Revised Statutes, and it is immaterial what the amended section contains, so as there is no doubt how it is to be read in the future. If there had been no section 22, *Laws of 1853*, ch. 80, has created one. *Laws of 1853*, ch. 80, is constitutional and valid. The legislature possesses all the power of the British Parliament, except as restricted by the constitution, either by express prohibi-

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tion, or necessary implication (People *v.* Count, 2 *Park. Cr.*, 412-414; Wynehamer *v.* People, 13 *N. Y.* [3 *Kern.*], 378, 391, 410-11, 428-30, 452-3, 467; People *v.* Draper, 15 *N. Y.*, 446, 545; Leggett *v.* Hunter, 19 *Id.*, 445; People *v.* Morrell, 21 *Wend.*, 563; Butler *v.* Palmer, 1 *Hill*, 324; Bloodgood *v.* Mo. & Hud. R. R., 18 *Wend.*, 9; People *v.* N. Y. Cent. R. R., 34 *Barb.*, 137, 138). To negative a law by necessary implication, there must be such a positive repugnancy between the provisions of the law and the constitution that they cannot stand together, or be consistently reconciled (People *v.* Draper, 15 *N. Y.*, 532-544; Sturgis *v.* Spofford, 45 *Id.*, 446-450; McCool *v.* Smith, 1 *Black*, 459; Wood *v.* United States, 16 *Pet.*, 342; 10 *Barr*, 448; Hartford *v.* United States, 8 *Cranch*, 109; Brown *v.* County Com., 21 *Penn.*, 32; Street *v.* Commonwealth, 6 *Watts & Serg.*, 209; Bowen *v.* Lease, 5 *Hill*, 221; Williams *v.* Potter, 2 *Barb.* 316; People *v.* Deming, 1 *Hill*, 271; *Potter's Dwaris*, 654). *Laws of 1853*, ch. 80, is not so repugnant. Art 2, § 1, does not confer absolute freedom of choice upon the electors, but the right "to vote" simply. So long as there are two persons left to choose between, the right "to vote" is not restricted (Barker *v.* People, 20 *Johns.*, 461.) Chancellor SANDFORD's opinion, in Barker *v.* People (3 *Cow.*, 703), is not authority. It is *obiter*, and is destroyed by the decision in the case. This power has been frequently exercised (1 *Rev. Stat.*, p. 116, § 1; see People *v.* Dean, 3 *Wend.*, 438; 1 *Rev. Stat.*, p. 116, § 2; pp. 101, 102, §§ 9, 15); and all city and village charters require some of their officers to be residents; also *Rev. Stat of Maine*, 170, § 6; *Gen. Stat. of Mass.*, p. 70, §§ 2, 9). *Laws of 1853*, ch. 80, is directly authorized by Art. 10, § 2, as construed by the courts (People *v.* Shepard, 36 *N. Y.*, 285; People *v.* Pinckney, 32 *Id.*, 377; People *v.* Draper, 15 *Id.*, 446-554; Devoy *v.* Mayor, 36 *Id.*, 449). A case must be presented beyond a reasonable doubt (Fletcher *v.*

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Peck, 6 *Cranch*, 87; *Exp.* McCollum, 1 *Cow.*, 550; Newell *v.* People, 7 *N. Y.* [3 *Seld.*], 9-109; 24 *Barb.*, 446; 5 *Abb. Pr.*, 107; McComber *v.* Mayor, 17 *Id.*, 35).

JAMES, J.—This action is brought to remove Clute from the office of superintendent of the poor of Schenectady, and to put Furman in possession.

It is claimed that under and by virtue of the Acts of 1829 (*Laws of 1829*, ch. 352), and 1853 (*Laws of 1853*, ch. 80), and the city charter (*Laws of 1862*, ch. 385, tit. 4, § 8), Clute, by reason of his being supervisor of the fifth ward of said city, was ineligible to the office of superintendent; and that, being ineligible, the votes cast for him were illegal and not to be counted, and that the relator having the highest number of votes cast, was entitled to the office and its emoluments.

Clute's ineligibility must be determined from his status at the time of the election, so that his subsequent resignation of the office of supervisor will not avail.

The statute creating this disqualification, prohibits the election of a supervisor as superintendent, &c.

The supervisor of wards in the city of Schenectady, in the statute by which such office is created, are placed subject to the same disabilities as supervisors of towns (Act of 1862, ch. 385, tit. 4, § 8).

The office of county superintendent of the poor was created by the act of 1824.

The substance of that act was, in 1828, incorporated into the Revised Statutes and made a part thereof, to take effect January 1, 1830. Superintendents were then appointed, and their compensations provided for by the boards of supervisors.

It was soon perceived that there was great impropriety in permitting the same person to hold these two offices; so that in 1829, the legislature provided by

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chapter 352, that no supervisor of any town, or county treasurer, should be *appointed* superintendent of the poor of any county. But this act, though passed before the Revised Statutes took effect, was never by legislative enactment, declared a part of the Revised Statutes. It has been inserted in the several editions of such laws up to and including the fourth edition, where it is placed and numbered as section 22 in title 1, chapter 20, part 1.

In 1847, the legislature, by chapter 498, made the office of superintendent elective; and, in 1853, chapter 80 was enacted, which declared that "section 22 of chapter 20, title 1, part 1 of the Revised Statutes, fourth edition," was amended so as to read: "No supervisor of any town or county treasurer, shall be elected or appointed to hold the office of superintennent of the poor of any county in any county of this State;" intending to amend the act of 1829, and designating a section containing that act, but denominating it as of the Revised Statutes.

Original section 22 of the Revised Statutes treated of matters in bastardy, whilst said section 22 of the fourth edition treated of a subject to which the proposed amendment had application; in fact, the act of 1829.

The legislative intent, therefore, is too clear to be disregarded, and the act of 1853 must be held as operating to so amend the act of 1829, as to make the latter applicable in terms to persons elected, as well as appointed. The amendment is, however, of little consequence.

The disqualification was against the union of the two offices in the same person, without regard to the mode of selection; and a change, from appointment to election, did not relieve the office from the statutory restriction.

It was also urged that the statutes of 1829 and

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1853 were unconstitutional: *First*, because the right of the elector to select and vote for a candidate from among the body of citizen electors was restricted. *Second*, because the right of eligibility of office is denied to the defendant. *Third*, because no member of the State can be disfranchised or deprived of any of the rights and privileges secured to any citizen, unless by the law of the land or judgment of his peers.

There is no force in any of these reasons, because not applicable to the case. The acts complained of restrict no elector in his vote; deprive no citizen of any right or privilege secured to him; nor disfranchise any one. The offices of supervisors and superintendent were created by statute, and the legislature had the power to declare the holding of one incompatible with holding the other. The inhibition is not against the office.

I am, therefore, of the opinion that both of said acts are constitutional; that a supervisor is disqualified from holding the office of superintendent of the poor, and that the defendant, by reason of his being a supervisor when voted for as superintendent, though receiving a majority of the votes cast, was not legally elected, and cannot, by virtue thereof, take and hold such office.

The next question is, the right of the relator to the office.

It is shown that he had the next highest number of votes cast. The point turns upon the question whether the votes cast for Clute are, or are not, to be thrown away. In England, it is settled that votes cast for a candidate known to the elector to be ineligible, are thrown away, and that the candidate having the greatest number of the votes left, or cast for eligible persons, is duly elected. Most of the English cases arose in elections by organized or corporate bodies, and therefore it has been held, that votes cast for a dis-

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qualified person might be regarded as blanks, but counted, if necessary, for the purpose of showing a quorum present.

In this country, the election of disqualified persons is absolutely void; and in cases where a plurality elects, votes given for an ineligible candidate after notice to the electors of that fact, are thrown out, and the candidate having the next highest vote, elected; but not so where a majority of the votes are required to elect.

In this State a plurality elects; in this case, the candidate having the highest number of votes was ineligible, and cannot take the office; therefore the only question is, did the electors have notice of such disqualification, or were the facts such that they were bound to take notice? If either, the votes for the ineligible candidate are to be thrown out, and the relator to take the office; otherwise the election was a failure, and the office is vacant.

In elections by corporate bodies, there is no difficulty of showing notice if it was given; but in popular elections, embracing an extended territory, it will ever be difficult, if not impossible, to show notice, or to show facts which the electors were bound to know from which notice can be presumed. It will not do to say, a notice to a part is notice to all, or that knowledge in part is knowledge in all; it cannot be inferred that because a certain number of electors knew a candidate disqualified, that all who voted for him also knew it, nor can they be presumed to have had notice.

Such a rule would operate to disfranchise those honestly voting for such candidate.

In this case, it is not claimed that the body of the electors had notice of the respondent's ineligibility, or that the facts were such they were bound to know. But it is insisted that the electors of the fifth ward were bound to know who was their supervisor; and

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that if the votes cast for the defendant in that ward are thrown out, the relator has a majority of the remainder and is elected. If the claim as to knowledge is conceded, the result insisted upon would not follow, for the reasons hereinbefore suggested. The votes of one locality cannot be separated from the other votes of the district. The whole vote must be taken together, and as such, stand or fall.

I am, therefore, of the opinion that, notwithstanding the respondent took no title to the office, and the relator had the greatest number of votes cast for an eligible candidate, yet, for want of notice to the electors of the respondent's ineligibility, or the existence of such facts as the electors were bound to know respecting such ineligibility, from which notice might be presumed, the votes cast for the respondent cannot be thrown out, and hence the election was a failure, and the office vacant.

Judgment of ouster.

BURCH *against* CAVANAUGH.

Supreme Court, Special Term; Third District, July, 1872.

**INJUNCTION.—ARREST.—JOINDER OF PLAINTIFFS.—
CITIZENS' ACTION AGAINST MUNICIPAL
OFFICERS.**

The common council of a city being divided on the question what day was fixed for their regular meeting, the minority, who claimed an earlier meeting than the majority, assembled and instructed the marshal to arrest and bring in the other members.—*Held*, that an action would not lie, at the suit of such other members, indi-

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vidually, to restrain the members composing the minority from meeting and acting as such, and to restrain the marshal from arresting the plaintiffs.

An injunction does not lie merely to restrain an illegal arrest; nor have the several persons threatened, in such a case, a right to unite in one action to enjoin their several arrests.

The insolvency of a person who threatens to make an arrest is not sufficient ground for issuing an injunction to restrain him from so doing.

A citizen cannot maintain an action to restrain aldermen of the city from illegally acting as the common council, even where the acts sought to be enjoined, include the arrest of the plaintiff.

Motion to continue an injunction.

John G. Burch, and nine others, members of the common council of the city of Albany, brought an action against Thomas Cavanaugh and eight others, three of whom were the city marshal and his assistants, and the others were the remaining members of the board of common council. The object of the action was to enjoin the latter from assuming to act as the minority of the common council, and to enjoin the marshal and his assistants from executing their order to arrest the plaintiffs and bring them into an alleged meeting of the common council, held by the minority.

A preliminary injunction was granted by the recorder of Albany, and the cause now came before the supreme court, on the usual motion to continue the injunction.

Jacob H. Clute and Galen R. Hitt, for defendant.

Rufus W. Peckham, Jr., for plaintiffs.

LEARNED, J.—This is an action brought by ten persons who are members of the common council of the city of Albany, against the remaining six members, the marshal of the city and two persons acting as his as-

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sistants. The object of the action is to restrain by injunction the six defendants, members of the common council, from meeting and acting as a minority of that body, and to restrain in like manner the marshal and his assistants from arresting the plaintiffs, and from executing any process issued by the other defendants towards compelling the attendance of any member of the common council at any meeting thereof.

By the charter of Albany (1 *Laws of 1870*, 165, tit. 3, § 6), a smaller number than a majority of the aldermen elect may adjourn from time to time, and may compel the attendance of the absent members. By section 7 of the same title, the common council shall "biennially appoint its clerk and designate the time and place of meeting." By title 6, section 17, no law, ordinance, by-law or regulation shall be rescinded or repealed, unless by a two-thirds vote of all the members elected.

At a meeting of the common council held May 13, 1872, they adopted among other rules of order the following :

"*Rule 37.* The regular meetings of the board shall hereafter be held on the first and third Mondays of each month.

"*Rule 34.* No rule of this board shall be altered, suspended or rescinded unless by a two-thirds vote of all the members elected ; and no motion to alter, suspend or rescind any such rule shall be in order without the unanimous consent of the board, unless notice thereof shall have been given at the previous regular meeting. . . .

"*Rule 32.* In case a less number than a quorum of the common council shall convene at any regular or special meeting, . . . the majority of the members of such common council present are authorized to send the city marshal or any other person for every or all absent members as such majority of members shall agree. Such city marshal or other person so authorized shall

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have power to arrest such absent member or members and detain him or them until discharged by the common council." . . .

These rules have not been altered, suspended or rescinded, unless the action hereinafter mentioned may have had that effect.

At a regular meeting of the common council on the third Monday (the 17th) of June, 1872, a motion was made that when the board adjourn it shall adjourn to meet again on the first Monday of October next. One of the aldermen objected to the motion, but it was entertained by the president and passed by a majority vote. One of the aldermen then objected that the motion required a two-thirds vote of all the members elected, as it was virtually a suspension of Rule 37, but the president decided that a two-thirds vote was not required. On appeal from his decision, such a decision was sustained by a tie vote. No previous notice of this motion had been given.

On the third Monday of July, 1872, the six members of the common council, who are defendants, met at the usual hour and place of meeting of the board, claiming to do so by the authority of Rule 37. As there was less than a quorum present they adjourned to the next day at the usual hour and place. On that day (July 16), and at the usual hour and place, these six defendants met, claiming to be a minority of the common council assembled at a regular meeting of the board. They then passed a resolution requiring the city marshal and two other persons (the remaining defendants), forthwith to arrest the other members of the common council (the present plaintiffs), naming them, and to bring them to the meeting of the common council. The marshal and his aforesaid assistants, after an interval, reported their inability to find these persons. Thereupon the meeting adjourned to the next evening, with instructions to the marshal to notify every member

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of the adjournment, and to inform him that if he failed to attend he would be arrested. Before the hour of meeting on the next evening this action was commenced and a preliminary injunction granted, with an order to show cause why it should not be continued. That motion is now made. It ought to be noticed in the outset that two things are sought by this complaint which are quite distinct. The one is the restraining of the six members of the common council from meeting as a minority; the other is the restraining defendants from arresting the plaintiffs. Some confusion has arisen in the discussion of the motion from a failure to distinguish clearly between the two alleged causes of action. So far as the threatened arrests are concerned, that alleged cause of action is clearly personal to each of these plaintiffs as individuals, while an alleged illegal meeting of a part of the common council is as clearly a matter in which these plaintiffs have no interest different or distinct from that one of any other citizens of Albany.

The first question, then, is this: Can several individuals unite in an action and restrain by injunction a number of persons who threaten them with illegal arrest?

I am not aware that injunctions are granted to restrain threatened arrests; and this is for a very good reason. If a person is illegally arrested, he has the prompt and efficacious relief by *habeas corpus*; and he has also redress from the wrong by an action of damages. Injury by an illegal arrest is not of such an irreparable nature that it cannot be compensated in damages. It is true, that injunctions are sometimes granted where other remedies exist. But generally those are cases where the other remedy would be inadequate; not where, as in this case, the other remedy is ample. No authority was produced in the argument for an injunction to restrain threatened injury to the

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person. In one case (*Wood v. Brooklyn*, 14 *Barb.*, 425), an injunction, among other things, restrained an arrest. But that was a case in which the arrest was part of the enforcement of a license law, and the enforcement would have destroyed the plaintiff's business.

But there is another difficulty as to this cause of action. These plaintiffs have no joint claim or interest in respect to their threatened arrest. The arrest of each, if made, would be an individual and personal matter. There is, therefore, no propriety in their uniting in an action to prevent threatened injuries which would be several and individual. It was said that equity interferes to prevent a multiplicity of suits. But several parties who had been separately arrested could not unite in an action for false imprisonment. On what ground, then, should they unite to prevent separate and several arrests? If these plaintiffs should be severally arrested, and if such arrests should be (as they claim) illegal, each would have a cause of action against the parties making the arrests. But these causes of action do not now exist, and may never arise. And the equity principle of preventing a multiplicity of suits has, I think, no application to this case.

It is said that the city marshal is of small pecuniary means. But if he is the agent of the six aldermen, defendants, and acts by their direction, I suppose they are liable for his acts, if illegal. And at any rate, the insolvency of a person who threatens to make an arrest cannot be ground for an injunction to restrain him.

So far, then, as the injunction restrains the defendants from arresting the plaintiffs, I am clearly of the opinion that it ought not to continue.

The second object of the complaint is to restrain the six aldermen from meeting as a minority of the common council. This action, it is to be observed, is not brought by the city, nor is the city a party to it. The

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plaintiffs, although in fact aldermen, do not represent in this action the city or the common council, but sue only in their individual capacities. That they are the majority in number of the common council gives them no peculiar right of action. Assuming for the present that the meeting of the six aldermen was illegal, there has been no meeting of the majority as a common council authorizing and directing this action. The action is brought by the plaintiffs as individuals. If it can be maintained by ten plaintiffs, it could be maintained by one. Nor am I able to see that the aldermen of a city, as individuals, have any right to maintain such an action as this, other than that which any citizen or citizens would have. It might be very suitable for them to act on account of their position, but so far as the legal capacity to maintain the action is concerned, that must depend on their character of citizens. And the question then is, can a citizen maintain an action to restrain the aldermen of a city, or a part of them, from acting as a common council, even assuming that their action as such is illegal. It seems to be decided in our highest court that he cannot.

In the case of *Doolittle v. Supervisors* (18 *N. Y.*, 155), it is said, "If the grievance consists in an alleged illegal exercise of official functions, those who question them, if they would have a preventive remedy, must invoke the action of the officer whom the law has appointed to sue in such cases. No private person or number of persons can assume to be the champions of the community, and in its behalf challenge the public officers to meet them in the courts of justice to defend their official acts." In *Roosevelt v. Draper* (23 *N. Y.*, 318), it is again said, "We have decided upon full consideration that it requires some individual interest, distinct from that which belongs to every inhabitant of a town or county, to give the party complaining a standing in court, where it is an alleged delinquency in the

administration of public officers which is called in question." These are cases, it is true, where the acts complained of as illegal were done by a majority of the body. The question of their illegality turned on other facts than the number of the body who assembled. But the principle seems to apply here. These six aldermen, defendants, claim to be acting in their official capacity. They claim that the meeting which they held was a meeting of the common council, competent indeed only to adjourn and to compel the attendance of others. But as to those acts, they claim to be acting not as an accidental assemblage, but as the legal body.

It is said by the plaintiffs, that the threatened arrests give them a private, personal interest in the matter, aside from the common interest of the public, and that therefore they have a right to maintain this action which others have not (*Milhau v. Sharp*, 27 *N. Y.*, 611). But I have already shown that injunctions are not granted to restrain threatened arrests. Even, therefore, if the plaintiffs have been threatened, that threat does not give them a right to maintain an action for an injunction; still less could it be said to give them a personal or private interest in a public matter. There is no property in the probability of being arrested.

The union of law and equity in one tribunal and under one form of action, has obscured the line which used to limit cases in which injunctions would be granted. A vague feeling has arisen that whenever a defendant is acting illegally, he should be restrained. The feeling has developed into practice to some extent, but it has not and probably never will become principle. Enough, however, has already been done to make the public uneasy at the frequent granting of injunctions. This modern custom is incorrect. Injunctions should not be granted unless they are necessary. A preliminary injunction, in many instances, as in this,

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operates as a decision of the whole question before trial, so that a plaintiff who has obtained a preliminary injunction has substantially gained his cause. It is a mode of relief not to be encouraged when other remedies are substantially sufficient.*

In the examination of this case thus far I have assumed that the proceedings of the defendants were illegal, and I have inquired only whether the plaintiffs had the right to maintain such an action on this assumption. Being confident that the action cannot be maintained, I need not examine whether the proceedings of the defendants were or were not legal. On that, therefore, it is unnecessary here to express any opinion. In the view which I have taken, that point is not involved.

Perhaps, without impropriety, I may add a suggestion to both parties, plaintiffs and defendants. It is well known that this controversy grows out of political disagreements. Whether one side is to blame or the other, or both, it should be remembered that all hold their offices, not for party purposes, but as the name implies, for the "common" welfare of the city, and it is not a mere play upon words to say that a "council" indicates conciliation.

The motion to continue the injunction must be denied, and the injunction, if any exists, vacated, with ten dollars costs of motion.

* See, on this subject, Van Veghten v. Howland, in the latter part of this volume.

PHILBRICK *against* DALLETT.

New York Superior Court ; General Term, April, 1872.

DEFENSES TO BILL OF EXCHANGE.—ANTECEDENT
DEBT, WHEN NO CONSIDERATION.

Where a draft is taken on account of an antecedent debt, without surrendering anything, the subsequent acceptors are not precluded from showing that their acceptance was procured by the fraud of the drawers, and was wholly without consideration.

Exceptions heard in the first instance at general term.

John Jay Philbrick sued Henry C. Dallett and others, in the New York superior court, upon a draft of ten thousand dollars, drawn by Requelme & Co., of Havana, upon and accepted by the defendants, composing the firm of Dallett & Son, at Philadelphia, to the order of the plaintiff, and dated February 26, 1869.

The answer contained a general denial of each and every allegation of the complaint, except such as thereinafter specifically admitted ; and it then set forth :

1. That the drawers obtained the acceptance by fraudulent misrepresentations, upon which defendants relied and of which the plaintiff was cognizant before such acceptance was made ;

2. That there was a failure of consideration between the drawers and defendants, of which also the plaintiff knew before acceptance ; and,

3. That the plaintiff never owned the bill or acceptance at all ; that he never parted with any value or consideration for it, and that it had always remained the property of Requelme & Co., so far as any property in it could be said to exist.

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Upon the trial, plaintiff, as a witness on his own behalf, produced the draft, which was read in evidence, and proved its acceptance by defendants, March 18, 1869, and the interest due thereon. The question was then put to him, "Are you the owner of that note?" The court excluded it as unnecessary, as possession of the draft was sufficient.

The court also declared it unnecessary for the plaintiff to prove the consideration of the draft in question.

Plaintiff thereupon rested.

Defendants called plaintiff as a witness on their side, and from his testimony it appeared that some time in February, 1869, Mr. Requelme came to Key West, and, while there, purchased from plaintiff a sunken steamer, called "The Ruby," for which he promised to send plaintiff either a draft or the cash within ninety days; that no bill of sale was made of the vessel, nor any record concerning her in the custom house, or any other office of the United States government; that Mr. Requelme thereupon left for Havana, and thence remitted the draft in question, which had not yet been accepted; that the draft came accompanied by a letter which read as follows:

"HAVANA, February 26, 1869.

"John Jay Philbrick, Esq., Key West:

"Dear Sir—Herewith \$10,000 in cy., sixty days, on Dallett & Son, Phila., which you will please collect and hold at the disposal of our Senor Don Manl. Requelme. We are, dr. sir, yours very truly,

"M. REQUELME & Co."

That plaintiff kept the draft on hand for about two weeks, and then sent it to a New York house for acceptance and collection; that the steamer so sold was never moved, that she remained sunk, and at the time of the commencement of this action was in the same state that she was sold in, and that no storm had occurred to hurt or injure her. Plaintiff insisted, how-

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ever, that he had delivered her over to M. Requelme at the time of the sale.

Defendants next called Henry C. Dallett, and offered to prove by him the real nature of the transaction between the firm of M. Requelme & Co. and defendants, with a view of showing that the draft was a fraud upon the defendants. The court excluded the proposed evidence, and defendants excepted.

Defendants then offered to prove that there was no consideration between the drawers and acceptors, claiming to have laid the foundation for such proof by showing that the alleged consideration between plaintiff and the drawers of the draft was prior to the acceptance of the draft by the defendants, and was not on the faith thereof. The court excluded the evidence, holding that it would assume that the proof offered would establish the facts sought to be proven, but that they were not sufficient, as the case stood, to defeat a recovery on the draft. Defendants excepted.

Defendants finally asked permission to go to the jury on the question whether Philbrick, the plaintiff, ever parted with any value for the draft. The court denied such request, and defendants excepted.

The court directed a verdict for plaintiff for the amount of the draft, with interest, eleven thousand seven hundred and eighty-five dollars; to which direction defendants excepted. The court ordered defendants' exceptions to be heard, in the first instance, at general term, and the entry of judgment to be suspended in the mean time.

William W. Goodrich, for plaintiff.

Joseph J. Marrin, for defendants.

BY THE COURT.*—FREEDMAN, J.—In excluding de-

* Present, BARBOUR, Ch. J., FREEDMAN and SEDGWICK, JJ.

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fendants' proposed evidence as to fraud, by the drawers, upon them, by means of which they were induced to accept the draft, and as to a failure of consideration between them and the drawers, the learned judge who presided at the trial clearly erred. He probably assumed that plaintiff had sufficiently shown himself to be a *bona fide* holder of commercial paper for value paid on the faith thereof. But such was not the fact. The sale of the steamer Ruby being a transaction between the plaintiff and M. Requelme individually, the plaintiff (under the direction of the firm of M. Requelme & Co., contained in the letter accompanying the draft, to collect the same and hold the proceeds subject to the order of M. Requelme, and in the absence of proof showing an appropriation by M. Requelme of the said proceeds to plaintiff's use), appeared, so far as the evidence went, in the character of a mere naked holder possessing authority to collect for the benefit of the true owner; especially as the court had, at an early stage of the trial, excluded as unnecessary the proof offered by plaintiff to establish actual ownership, and had ruled proof of possession to be sufficient.

Even upon plaintiff's theory, however, that he took the draft before acceptance, for the debt of M. Requelme, the evidence was admissible. In such case, and as the evidence then stood, plaintiff took the unaccepted draft on account of an antecedent debt, without parting with any value upon the faith of either the draft or its acceptance, and defendants were not precluded from showing that their subsequent acceptance was procured wholly by the fraud of the drawers, and was, in point of fact, wholly without consideration. That was one of the very issues raised by the answer, and, if established, as we must assume it would have been but for such erroneous exclusion, would have cast the burden of proof upon the plaintiff to establish that

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he was an innocent actual owner and holder of the draft for value paid on the faith of its acceptance.

As against the holder of a draft, the acceptor, as a general rule, stands in the same position as the maker of a promissory note, and the drawer in the same as the indorser. By his acceptance the acceptor admits that he has funds of the drawer in his hands to pay it. He is, in such case, regarded as the principal, and the drawer as his surety, and the accepted draft imports a debt due from the acceptor to the drawer, which is assigned to the payee. The instrument being one of those which, on account of their negotiable quality and universal convenience in mercantile affairs, are specially favored by the law, if A., in the course of trade, parts with value on the faith of B.'s acceptance, the law, to protect A., as an innocent holder for a valuable consideration, against B.'s contradicting the words, "Value received," written above his promise, presumes a consideration to exist, and B. will not be permitted to overthrow such presumption by actual proof to the contrary.

But this rule applies only to a *bona fide* holder for a valuable consideration ; and the doctrine as to what constitutes a person such *bona fide* holder for value, again varies in cases presenting a wide and marked distinction.

Thus, in *Cole v. Saulpaugh* (48 *Barb.*, 104), and *Schepp v. Carpenter* (49 *Id.*, 542), the holder of an accommodation note, which had been given by the maker without restriction as to the manner in which it should be used by the payee, was held to be a *bona fide* holder for value as against the maker, notwithstanding it appeared that he took it for an antecedent debt and with notice of its character as accommodation paper. These decisions are based upon the fact that the payee, not being limited or restricted as to the manner of its use, had a *right* to apply it to the

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payment or security of an antecedent debt, or to sustain his credit with it in any other way.

So, in the absence of fraud, an acceptance has been held to involve a consideration, inasmuch as it delays the holder's resort to the drawer, which he might have immediately, in case of non-acceptance; and for the same reason a subsequent acceptance before maturity, and for the accommodation of the drawer, has been held to inure to the benefit of the holder who discounted the draft before acceptance, in the expectation, justified by a previous course of dealing, that it would be so accepted (*Mechanics' Bank v. Livingston*, 33 *Barb.*, 458).

But where the acceptance is not only without consideration in fact, but, in addition, has been procured by means of a fraud practiced upon the acceptor, an entirely different rule prevails. Here, the mere taking of the draft on account of an antecedent debt, without giving up or surrendering something of value on the faith of its acceptance, is not enough to constitute the holder a *bona fide* holder for value as against the acceptor. The doctrine of *Swift v. Tyson* (16 *Pet.*, 1), has not been followed in this State. On the contrary, our courts held, at quite an early day, that the receipt of commercial paper, fraudulently put in circulation or diverted from the purpose of which it was originally issued, merely as payment or security for a precedent debt, no new credit or other thing of legal value being given on the faith thereof, and no security being relinquished or discharged, nor any new responsibility incurred on the credit thereof, is not parting with value, such as to enable the holder to enforce such commercial paper against an accommodation party, or to hold it against the true owner, or to hold it free of equities existing upon it against the transferrer at the time of the transfer.

This rule has been firmly maintained, both at law

and in equity, by a long and uninterrupted series of adjudications, and is, beyond question, the settled law of this State (*Coddington v. Bay*, 20 *Johns.*, 637; affirming *S. C.*, 5 *Johns. Ch.*, 54; *Stalker v. McDonald*, 6 *Hill*, 93; *Wardell v. Howell*, 9 *Wend.*, 170; *Rosa v. Brotherson*, 10 *Id.*, 86; *Hart v. Palmer*, 12 *Id.*, 523; *Ontario Bank v. Worthington*, *Id.*, 593; *Payne v. Cutler*, 13 *Id.*, 605; *Morton v. Rogers*, 14 *Id.*, 576; *Commercial Bank v. Norton*, 1 *Hill*, 501; *Manhattan Co. v. Reynolds*, 2 *Id.*, 140; *Scott v. Betts*, *Hill & D. Supp.*, 363; *Elliott v. Dudley*, 19 *Barb.*, 326; *Francia v. Joseph*, 3 *Edw. Ch.*, 182; *Clark v. Ely*, 2 *Sandf. Ch.*, 166; *Furniss v. Gilchrist*, 1 *Sandf.*, 53; *Stewart v. Small*, 2 *Barb.*, 559; *Mickles v. Colvin*, 4 *Id.*, 304; *Spear v. Myers*, 6 *Id.*, 445; *Clark v. Gallagher*, 20 *How. Pr.*, 308; *Farrington v. Frankfort Bank*, 31 *Barb.*, 183; *Prentiss v. Graves*, 33 *Id.*, 621; *Cardwell v. Hicks*, 37 *Id.*, 458; *West v. American Exchange Bank*, 44 *Id.*, 175; *Crandall v. Vickery*, 45 *Id.*, 156; *McBride v. Farmers' Bank*, 26 *N. Y.*, 450; *Lawrence v. Clark*, 36 *Id.* 128).

It is only where a creditor receives a negotiable paper fraudulently put in circulation or diverted from its purpose in good faith *and* in actual satisfaction and discharge of a prior indebtedness, so that unless such paper is available in his hands, he loses the demand, that this is considered as parting with value. In such case, the actual discharge of the personal responsibility of the debtor is equivalent to parting with securities or to paying money. The extinction of a legal demand in its original form is, however, to be proved affirmatively; and the question whether a party is a holder for value, so as to displace in his favor any right or equity of prior parties, depends upon the fact being established of an intended and actual extinguishment (*New York Exchange Co. v. De Wolf*, 3 *Bosw.*, 86, and authorities there cited).

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Time and space do not permit me to make a more extended reference to the authorities cited than I have done, and I will conclude, therefore, by calling attention yet to the following decisions of a comparatively recent date, which deserve to be carefully noted.

In *McBride v. Farmers' Bank* (26 *N. Y.*, 450), and *Commercial Bank of Clyde v. Marine Bank* (6 *Abb. Pr. N. S.*, 33; *S. C.*, 3 *Keyes*, 337), it was held that a bank does not become a purchaser for value of demands remitted to it for collection, by reason of its having a balance against the remitting bank, for which it has refrained from drawing, and of its having discounted notes for the latter upon its indorsement, in reliance upon a course of dealings between the banks to collect notes for each other, each keeping an open account of said collections, treating all the paper sent for collection as the property of the other, and drawing for balances at pleasure.

In *Bright v. Judson* (47 *Barb.*, 29), it was expressly decided that fraudulent representations, by which one is induced to accept a bill, are a bar to a recovery thereon by a holder who took the bill in payment of an antecedent debt, without surrendering something of value upon the faith of such acceptance.

And in *Farmers' & Mechanics' Bank v. Empire Stone Dressing Co.* (5 *Bosw.*, 289), the decision was, that to entitle one to enforce an acceptance, which is otherwise invalid (whether for want of power in the agent who wrote the acceptance to bind his principal, as in that case, or for fraud practiced by the drawer upon the acceptor, as in case at bar, makes no difference), on the ground that he is a *bona fide* holder for value, it must appear that he parted with value upon the faith of such acceptance. He may be a *bona fide* holder of the bill for value paid therefor, and be entitled to enforce it against every other party thereto, and yet have no right to recover on such acceptance.

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In view of the authorities referred to, it is entirely clear that defendants had an unquestionable right to prove the facts embraced in the two offers made, and that the exclusion of their proposed evidence constituted error.

Defendants' exceptions to such exclusion of their evidence and to the direction of a verdict against them must, therefore, be sustained, and the verdict must be set aside, and a new trial ordered, with costs to defendants to abide the event.

BARBOUR, Ch. J., and SEDGWICK, J., concurred.

COREY *against* LONG.

New York Superior Court; Special Term, June, 1872.

RECEIVER'S DUTIES.—HIS POWER TO APPOINT DEPUTIES AND EMPLOY COUNSEL.—HIS CHARGES AND ALLOWANCES.

The duties of a receiver, by the general rules of equity and also under the Code of Procedure and the rules of court, considered and discussed.

Where, in a suit between partners, a receiver of partnership property has been irregularly appointed,—*e. g.*, without notice and by a judge out of court,—the order will be sufficient to protect the receiver if he has acted under it in good faith, and a long time has been allowed to pass without any steps having been taken to set it aside by motion or on appeal.

In case such an irregularity has been committed, however, the accounts of the receiver will be examined with great strictness.

A receiver of partnership property has no power, except by special order of the court, to appoint a deputy receiver, to be paid out of the fund.

He may, however, appoint a competent person to take charge of and

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wind up the business, and a reasonable number of keepers for the protection of the property; and may pay them, out of the fund, a reasonable compensation.

He cannot, however, employ counsel at the expense of the fund, except by leave of the court. In cases where he is in doubt as to the proper course to pursue, he should apply to the court for instructions, or for leave to employ counsel.

Hearing upon exceptions to referee's report.

F. N. Bangs, for the assignee in bankruptcy; That the receiver's taking possession was a legal process, cited 7 *Blatchf.*, 262; *Re Binninger & Clark*, 6 *N. B. R.*, 43; *Re Merchants' Ins. Co.*, *Platt v. Archer*, *MSS.*

James F. Morgan, for the receiver.

FREEDMAN, J.—This cause was brought on and submitted upon the pleadings and all proceedings and orders heretofore had and made therein, for the final determination of such questions as remain undecided. From the papers thus submitted, it appears that, prior to December 7, 1869, Albert B. Corey and Walter P. Long were partners, under the firm name of Walter P. Long & Co. On December 7, 1869, Corey sold to Long his (Corey's) interest in the partnership property and effects, and Long agreed to pay the existing debts of the partnership. On January 13, 1870, Corey commenced his action in this court for the purpose of restraining Long from interfering with the property of the firm of Walter P. Long & Co., and for the appointment of a receiver to take possession of the property and assets, convert them into money and pay the debts of the partnership. At the commencement of the suit, an order was granted by a justice of this court enjoining Long, in accordance with the demand of Corey's complaint, and a further order was made by the same justice, and entitled and entered as an order made by the court at special term, appointing James M. Gano as receiver of all the property and assets of

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the late firm of Walter P. Long & Co. On January 17, 1870, and upon motion papers presented by Long, an order was made staying proceedings under the first named two orders, and requiring Corey to show cause why they should not be vacated. This last order was, on the same day, so far modified by the justice who had made the appointment of a receiver, as to allow the receiver and an officer of this court, Mr. Cosgrove, to take and hold possession of the property until the final order of the court. Upon the hearing of the motion at the special term, the order appointing the receiver was vacated, but the motion to dissolve the injunction denied. On January 31, 1870, the court, at special term, upon a new motion founded upon notice, duly granted an order appointing the said James M. Gano receiver, "of all the stock, fixtures, assets and property of whatever nature and kind soever belonging to the firm of Walter P. Long & Co., with all the usual power and authority granted to receivers in such cases made and provided." Upon such appointment, the receiver filed a bond in the sum of five thousand dollars.

On February 4, 1870, an order was made by the justice who had originally granted the injunction and appointed the receiver, without notice to any of the parties in the cause, and wholly upon the *ex-parte* application of the receiver, bearing date of that day, which, after the recitals contained therein, provides as follows:

"*It is ordered*, that the said James M. Gano, receiver of the firm of Walter P. Long & Co., be, and he is hereby authorized, empowered and directed to sell at public or private sale, all the personal property belonging to said firm of Walter P. Long & Co., now in his possession and charge of him, said Gano.

"And it is further ordered, that the said James M. Gano be authorized, empowered and directed to pay out of the proceeds of said sale or sales, all the neces-

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sary charges and disbursements incurred by him in the keeping and preserving said property, and also the necessary disbursements and charges that may be incurred in carrying out this order.

“And it is further ordered, that the said James M. Gano safely invest the proceeds arising out of the sale of said property, after deducting the necessary charges and expenses, and hold the same until the further order of this court.”

On February 23, 1870, the defendant, Long, appealed to the general term from the orders of the special term refusing to vacate the injunction and appointing a receiver. The general term reversed the said orders on the ground that the plaintiff, Corey, not having reserved a lien upon the partnership property so as to require its application to the payment of the partnership debts, the defendant, Long, had acquired an absolute title; that Long's mere personal covenant to pay such partnership debts, and to indemnify Corey against them, did not give Corey such a lien upon or interest in or equity against the property in dispute, as is necessary to exist for the maintenance of the action.

On April 22, 1870, William McFarlane, a creditor of Corey and Long, commenced proceedings in the district court of the United States for the southern district of New York, against Corey and Long, to obtain an adjudication of bankruptcy against them; and on April 30, 1870, such an adjudication was made, and William P. Buckmaster having been appointed assignee in bankruptcy, the court in bankruptcy duly assigned to him all the property of the bankrupts, and each of them, by assignment dated May 25, 1870.

Thereupon the court, at the May special term of 1870, granted and duly made an order, pursuant to a motion made on notice for that purpose, declaring the action abated except for the purpose of passing the accounts of the receiver and of determining the amount

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of his fees, adjudging the said William P. Buckmaster as such assignee entitled to the property in controversy subject to such accounting, referring it to a referee to pass the accounts of the receiver and to ascertain and report to the court the result of such accounting, and substituting the said William P. Buckmaster as the sole party to the action in the place and stead of the said Albert B. Corey and Walter P. Long, for the sole purpose of such accounting, and of prosecuting the said order and procuring a delivery of the said property to him.

Before the referee, the receiver filed an account showing that between February 5, 1870, and March 28, 1870, he had received in all, from the property of which he took possession, eight thousand one hundred and twenty-three dollars and four cents; that he had paid to the assignee two thousand five hundred dollars, and that he claimed credit for other payments made on account of expenses incurred, three thousand eight hundred and eighty-eight dollars and forty-nine cents. The referee found some of the amounts charged to be excessive, but allowed a large portion of the payments for which the receiver claimed credit, and adjusted the balance due by the receiver at two thousand three hundred and seventeen dollars and forty cents, and directed that sum to be paid to the assignee in bankruptcy.

The assignee in bankruptcy and the receiver severally excepted to the referee's report. Upon these exceptions being brought to a hearing on March 1, 1872, the court made an order directing the referee to take and reduce to writing and certify to the court such further evidence touching the amounts actually paid by the receiver to keepers or other persons employed by him in taking care of, or selling or disposing of said property, and as to the necessity of employing such keepers and assistants, and as to the reasonableness and propriety of the sums paid or allowed to such per-

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sons respectively, by such receiver, and also directing that the further hearing of this cause upon the referee's report already made, and the exceptions thereto, be laid over until the coming in of such further testimony, and that upon such coming in, either party might bring on the hearing on notice, and that upon such hearing, any order made in this cause might be produced and referred to in the same manner and with the like effect, as if such order had been produced in evidence before such referee. Such further evidence has been taken and is now submitted.

Upon these matters and proceedings I must hold, that the assignee in bankruptcy is not entitled to an adjudication, as claimed by him: 1. That the legal process under which the receiver took possession of the property in controversy, even if such property belonged to Corey and Long jointly, was in fraud of the bankrupt law, and was therefore void as against the assignee. 2. That, as the orders appointing Gano as receiver only authorized him to take possession of the partnership property of Corey and Long, and he, in point of fact, took property by virtue of his said appointment which, in judgment of law, had become the property of Long individually, he was a trespasser from the beginning, and is chargeable as such, with the highest value of the goods and property taken by him from the time of its taking, to the end of the trial, without any deduction or allowance whatever, for expense or otherwise. The order for his appointment clearly contemplated that he should take possession of the identical property which he subsequently took; and if this court, in granting the said order at special term, made a mistake as to the law applicable to the case as then presented, the receiver cannot be made to suffer for it. Again: the assignee in bankruptcy cannot, at this late day, question the validity of the order made at the May special term of 1870, declaring the action

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abated, except for certain purposes therein specifically enumerated. If he felt aggrieved by it, he should have appealed. Not having done so, but having accepted the benefits conferred by the order and proceeded under it, he is bound by it.

The only questions, therefore, which are properly before me for determination, relate to the extent of the powers of the receiver, the manner in which he discharged his duties, his charges therefor, the state of his accounts, the balance due by him, and the relief to be granted to insure the payment of such balance to the assignee. These questions must be determined according to the well settled course and practice of courts of equity. The appointment of receivers is a high power. It is never exercised if any other safe or expedient remedy can be used, and never when irreparable injustice might follow. Prior to the adoption of the Code, there was, as shown by VAN SANTVOORD in his admirable treatise on equity practice, no statutory provision which professed to define the powers of a court of equity in the appointment of receivers. But a long line of decisions and a uniform course of practice in the courts of chancery, both in this country and in England, had marked out the jurisdiction asserted by the courts in this respect, and defined with tolerable accuracy the cases in which this extraordinary power would be exercised. By section 244, the Code attempts in a few general statutory provisions to condense the whole body of the practice, both in law and equity in this respect, and to mark out the general rules governing the appointment of receivers. But these provisions are of so general a character that under another provision of the Code, which retains the old rules and practice where they are not inconsistent with the Code or have not been expressly abrogated, old principles may and must still be resorted to for the determination of particular questions. The exercise of the power, therefore, must

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depend, as it always did, upon the sound discretion of the court in each particular case, in which it is made to appear as fit and reasonable that some indifferent person should be appointed as receiver. But there is no case in which the court appoints a receiver merely because the measure can do no harm. A receiver appointed by the court is appointed not on behalf of the complainant or of the defendant only, but for the benefit of all parties who may establish rights in the cause; and the money in his hands is in *custodia legis* for whoever can make out a title to it. The court itself has the care of the property in dispute; the receiver is but its creature, and, therefore, an officer of the court. As a general rule, the receiver should be a person wholly disinterested in the subject matter of the suit (*Bennett's Master*, 93), and should not interfere in any litigation between the parties (*Comyn v. Smith*, 1 *Hogan*, 81). This principle was formerly adhered to with such strictness that courts held that the receiver ought not to make any application to the court in the first instance; that if he find himself in circumstances of difficulty, he should apply to the plaintiff to make the necessary application, and that only on plaintiff's refusal so to do, the receiver may properly apply (*Parker v. Dunn*, 8 *Beav.*, 497).

And the practice thus laid down the courts enforced so rigorously that whenever a receiver brought forward a motion, without having previously applied to the proper party to make it, it was refused, and the receiver, in some instances, ordered to pay the costs (*In re Doolan*, 2 *Con. & L.*, 232; *S. C.*, *Dr. & War.*, 442; *Clark v. Fisher*, *San. & Sc.*, 684; *O'Connor v. Malone*, 1 *Ir. Eq. R.*, 20; *Wrixson v. Vize*, 5 *Id.*, 276; *Richards v. Goold*, 7 *Id.*, 209).

It being the duty of a receiver to remain indifferent between the parties and not to interfere in the litigation pending between them, it becomes his further duty to

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protect the property entrusted to him to the best of his ability for the interests of all parties to the suit, no matter how various and conflicting these interests may be, without allowing himself to be controlled by the representatives of any one of the parties (*Iddings v. Bruen*, 4 *Sandf. Ch.*, 417), and consequently he will not be permitted, except upon the consent of all parties, to employ the counsel, solicitors or attorneys of either of the parties to the suit to assist him in the discharge of his duties. The attorneys, solicitors or counsel of the several parties are bound in duty to their clients to watch the proceedings of the receiver and to see that he faithfully discharges the duties of his trust (*Ryckman v. Parkins*, 5 *Paige Ch.*, 544).

Being the mere instrument or hand of the court, he has a right, at any time, to apply to the court for instructions as to his duties under the orders of the court (*Curtis v. Leavitt*, 1 *Abb. Pr.*, 274), and the court will advise and afford him all necessary and proper protection. Thus the possession of a receiver is not to be disturbed without leave of the court (*Brooks v. Greathed*, 1 *Jac. & W.*, 178); and even an action cannot be brought against him without such leave (*Angel v. Smith*, 9 *Ves.*, 335). It is a contempt of court for a third person to attempt to deprive him of that possession by force, or even by a suit or other proceeding, without the permission of the court by whom the receiver was appointed (9 *Ves.*, 355).

Where violence is threatened, a writ of assistance, directed to the sheriff, may, in some extreme cases, be obtained, or the court may attach the wrongdoer (*Fitzpatrick v. Eyre*, 1 *Molloy*, 171).

And where a receiver has been dispossessed by an act of a third party, not sanctioned by the court, an attachment may issue against such third party, and the latter may not only be punished for the contempt,

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but compelled to restore the property (*Noe v. Gibson*, 7 *Paige*, 513).

Again, being the mere creature of the court, a receiver, unless appointed under a special statute for a special purpose, as for instance the statute directing proceedings against corporations (2 *Rev. Stat.*, 438), has no powers except such as are conferred upon him by the order for his appointment and the course and practice of the court (*Verplanck v. Mercantile Ins. Co. of N. Y.* (2 *Paige Ch.*, 438-452).

The rules of the English court of chancery were formerly strict in not allowing a receiver to do many things, such for instance as making leases, or even repairs, without a previous approval of a master; and he was not permitted under any circumstances to lay out more than a very small sum, at his discretion. The court even exercised great caution in granting a reference to a master, for the purpose of ascertaining whether the proposed transaction was or was not for the benefit of the parties interested. But, says Mr. HOFFMAN, our court would undoubtedly sanction, when performed, what it would have directed to be done; and it is the constant course for officers of this description to perform their duties without the previous approval of the court (*Hoffman's Master*, 156). To this assertion Mr. EDWARDS, in his admirable work on receivers in equity, very properly replies that, "if this be so, he must get his power through the practice of the court; and we are inclined to doubt whether a receiver should step far out of his order without its authority. The point is not whether the court may possibly protect him when he has volunteered an act, but whether he ought to have done it without direction." This, in my judgment, is not only the correct view, but the proposition thus laid down should be strictly adhered to. To command and retain public confidence and respect in a country founded upon free republican

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institutions like ours, courts cannot afford to sanction loose practice in the management of estates in dispute.

What then is the course and practice of the courts in such matters? It is prescribed by Rule 92 of the general rules of 1858 (the 93rd of the revision of 1871), which is as follows :

“Every receiver of the property and effects of the debtor shall, unless restricted by the special order of the court, have general power and authority to sue for and collect all the debts, demands and rents belonging to such debtor, and to compromise and settle such as are unsafe and of a doubtful character. He may also sue in the name of a debtor, where it is necessary or proper for him to do so ; and he may apply for and obtain an order of course that the tenants of any real estate belonging to the debtor, or of which he is entitled to the rents and profits, attorn to such receiver, and pay their rents to him. He shall also be permitted to make leases from time to time, as may be necessary, for terms not exceeding one year. And it shall be his duty, without any unreasonable delay, to convert all the personal estate and effects into money ; but he shall not sell any real estate of the debtor, without the special order of the court, until after judgment in the cause. He is not to be allowed for the costs of any suit brought by him against an insolvent from whom he is unable to collect his costs, unless such suit is brought by order of the court, or by the consent of all persons interested in the funds in his hands. But he may, by leave of the court, sell such desperate debts and all other doubtful claims to personal property, at public auction, giving at least ten days’ public notice of the time and place of such sale.”

The examination thus far made has established beyond doubt that the receiver in this case possessed no powers except such as were conferred upon him by the orders of his appointment, the order of February

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4, authorizing him to sell, and the rule referred to. These have been quoted in full, and any act done beyond them, he must justify either by the consent of the parties in interest, the special order of the court obtained for the purpose, or the clear necessities of the case. It is true, that the order of February 4, 1870, is, itself, open to criticism for the reason that it was made upon the *ex-parte* application of the receiver, without notice to any of the parties, and not by the court, but by a judge out of court. But as no steps have ever been taken to have it set aside on motion, or reversed upon appeal therefrom, and the receiver has acted under it, the assignee in bankruptcy is too late to question it so far as it affords protection to the receiver for acts done under it in good faith. The irregular manner, however, in which it has been obtained, and the fact that the receiver has not seen fit to apply to the court for any instructions under it, as he might have done in case of doubt or difficulty, impose upon the court the duty of holding the receiver to a strict account of his stewardship under the same.

I now proceed to examine the manner in which the receiver executed the trust and his charges therefor. He claims to have received from all sources eight thousand one hundred and twenty-three dollars and four cents, and to have paid out as necessary expenditures three thousand eight hundred and eighty-eight dollars and forty-nine cents. These expenditures include large payments for alleged services to deputy receivers, keepers, the plaintiff in the action, plaintiff's counsel and the receiver's counsel.

Descending still farther into particulars, it is found that the goods consisted of spool silks and skein silks, that the cases of goods were like wardrobes, and that all the property was contained in a part of the second floor of the building No. 290 Broadway, in the city of New York. The receiver claims to have superintended

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the whole business of the receivership ; but at a later stage of his examination he admits, that he had also to attend to his own business, which was that of a dentist, and that he employed deputy receivers to act for him during his absence. One of these was George L. Simonson, a lawyer, who had his office in the same building in which the property was contained. According to the receiver's statement, Simonson was employed at the rate of fifteen dollars per day, and under such arrangement received six hundred and ninety dollars. According to Simonson's version, he was employed by the receiver to make an inventory under each of the two orders for the appointment of said receiver, that he was paid one hundred and fifty dollars for each of the said inventories, that he subsequently charged the receiver two hundred and fifty dollars, retaining fee for his services as counsel in supervising the accounts and attending to the sales of the assets and taking charge of the moneys collected, that he was afterwards paid the sum of forty dollars for disbursements, and that these were all the amounts he received. These sums amount in the aggregate to five hundred and ninety dollars, or one hundred dollars less than the receiver swears he paid. Moreover, it appears that each of the inventories consisted only of eleven lines, and that Simonson, on May 12, 1870, was substituted as attorney for the plaintiff in the action.

As to the employment of the plaintiff, A. B. Corey, who had a three years' experience only in the business, the receiver testifies that he employed him at the rate of twenty dollars per day, but not for any specified time, to sell the goods ; that Mr. Corey was thus employed from January 31, 1870, to March 17, 1870, and received nine hundred and twenty dollars for such services. This statement, if true, shows that Corey received the same pay for Sundays as for week days during the period named. The assignee in bankruptcy

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on the other hand, shows by disinterested witnesses, that the services of a competent man to take charge of and wind up the business, should not have exceeded two hundred dollars per month. It finally appears that, besides the plaintiff, the receiver engaged the services of one J. A. Conklin, as collector and assistant salesman, of one of C. F. Merritt, "to sell goods, bring in customers and mark goods," of C. B. Corey, plaintiff's brother, "to mark and sell goods," and of one Colton, "to sell goods on a commission."

As to the employment of deputy receivers, the receiver swears that he had two of them, and yet in other parts of his examination he refers to Simonson, Ward, Early, and James Clark as deputy receivers, and shows payments to them as such. He also enumerates Ward, Early and Clark as keepers, in conjunction with Cosgriff, Griffin and Conklin, and shows payments to all of them as such keepers. The employment of this large force to stand guard over premises proven to be eight feet by thirty-six feet in size, the receiver accounts for by stating that, in consequence of threats made by Long, he, the receiver, thought it necessary to have a good many keepers, for fear that he might be put out of possession. But he cannot remember what Long said, and he never considered the threats, as made, of sufficient importance to report them to the court, and to ask the court's instructions and protection. Not one of these keepers has been placed upon the witness stand to prove the extent of services really performed.

Time and space will not permit me to enumerate in detail all the irregularities, inconsistencies and absurdities which appear to have been committed by the receiver. Suffice it to say that, upon his own showing, his conduct has been reckless, and unmindful of the solemn duty which he owed to the court that appointed him, and to the interests of the parties and their creditors. His charges cannot be indorsed as necessary ex-

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penditures in the proper execution of his trust, or under any order or in the course and practice of the court. Their sanction would cast disgrace and reproach upon the administration of justice. I exceedingly regret the necessity for use of such harsh language. But its employment on this occasion is imperatively called for by the evidence, as well as by considerations of public policy touching the due administration of the law. A receiver, who steps outside the order of his appointment, and assumes the role of an actor, without the consent of or notice to the parties or the court, must be taught that the law will hold him to a strict account, and that the court, on the final passage of his accounts, will not ratify any expenditure, unless the same has been necessarily incurred for the benefit of his estate.

With these remarks, I proceed to pass specifically upon the questions presented by the exceptions filed to the referee's report, and to determine the allowances to which the receiver is entitled. My conclusions are as follows:

1. The referee correctly held that the sum of six hundred and ninety dollars, paid to G. L. Simonson, is not a proper charge against the moneys in the hands of the receiver. The duties performed by Simonson should have been performed by the receiver. The latter had no power to appoint a deputy, to be paid out of the fund.

2. The referee correctly held that the amount of nine hundred and twenty dollars, paid to Albert B. Corey, the plaintiff, is excessive. But he erred in subsequently allowing seven hundred dollars in place thereof. According to the theory upon which the action was instituted, it was plaintiff's own interest to have the goods realize as much as possible. He should for that reason have lent his efforts willingly, without compensation, to secure such a result. But under the

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decision of the general term, above referred to, plaintiff never had a cause of action. He wrongfully managed, by a resort to the forms of law, to have a receiver appointed over the property of his late partner. In this way plaintiff eventually succeeded in throwing the entire affairs of the late copartnership into bankruptcy; and having succeeded in that, it would be an infringement of the rights of his late partner and of the creditors of the firm, to award him an exorbitant compensation, at their expense, for services which it was his interest to perform, especially when it is borne in mind, as it always must be, that the receiver employed him without authority, and without notice to the defendant. The item of seven hundred dollars must be disallowed. In place thereof, the receiver may have a general allowance of three hundred dollars, for the employment of a competent person to take charge of and wind up the business.

3. Having already demonstrated the want of the receiver's power to appoint a deputy, to be paid out of the fund, the referee was right in disallowing the claim of one thousand four hundred and thirty-five dollars, for keepers and deputy receivers. But the sum of seven hundred and fifty-six dollars, allowed for keepers, at the rate of three dollars per day for each keeper, for twenty-eight days, must be still further reduced. Considering the nature, quantity and quality of the property, and the size and location of the premises, I can, upon the whole evidence, perceive of no necessity which rendered the employment of more than two proper and justifiable. Consequently, the sum of one hundred and sixty-eight dollars is all that can be allowed on that account.

4. As to the claim of three hundred and fifty dollars, paid to Roger A. Pryor, counsel for the plaintiff, there seems to be sufficient evidence to sustain the finding of the referee, that the said sum was paid over

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under an order made by a justice of this court. As no appeal has been entered from that order, nor any steps taken to have it set aside, that item is allowed.

5. The allowance of two hundred and forty dollars to James F. Morgan, for services as counsel to the receiver, cannot be approved. Although in cases presenting difficult questions, a receiver, instead of taking up the time of the court with frequent applications for instructions, may and should apply to his own counsel, yet this should be done either with the sanction of the court, or at the expense of the receiver. In the present case, no authority to employ counsel was asked for or given, and no necessity for such employment appears from the evidence. Moreover, from the whole conduct of the receiver, it is clearly apparent that the said counsel either did not advise the receiver as to his proper conduct, and, therefore, earned nothing, or else gave erroneous advice, which was of no value. For these reasons, the claim of two hundred and forty dollars must be disallowed.

6. The finding of the referee, allowing two hundred and fifty-three dollars and forty-nine cents, for rent, janitor, office boy, postage, and other incidental expenses, has not been questioned.

7. The allowance to the receiver of the sum of four hundred and six dollars and fifteen cents, for his fees, may stand. But as his conduct has rendered two references necessary, he must be charged with the sum of two hundred and twenty-seven dollars and fifty cents, which is one-half of the expense thus occasioned.

8. The exceptions filed by the receiver are overruled, and those of the assignee in bankruptcy are sustained, so far as necessary to conform the report of the referee to the views and allowances herein laid down and made. The balance chargeable against the receiver, after these corrections are made, together with interest thereon, the assignee in bankruptcy is entitled

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to have. To recover it, such assignee may have leave, 1. To issue execution; 2. To apply for an attachment against the receiver in case of non-payment; and, 3. To sue the sureties upon the bond given by the receiver.

WADE *against* ORTON.

New York Common Pleas; Special Term, August, 1872.

ATTORNEY'S LIEN ON RECOVERY AND COSTS.—POWER
OF PARTIES TO SETTLE SUITS WITHOUT NO
TICE TO THEIR SEVERAL ATTORNEYS.

A settlement of a suit by the parties thereto, after verdict but before entry of judgment and pending a stay of proceedings, is not necessarily in derogation of the rights of the attorney of the prevailing party to such costs as have accrued at the time of the settlement; and a satisfaction of judgment entered in accordance with such settlement will not be set aside, on motion of the attorney, unless it is shown that the settlement was made collusively, and in fraud of the attorney's rights.

Before entry of judgment, the attorney has no lien on the recovery and costs, and the parties may settle without the consent of their attorneys.

Motion to set aside satisfaction of judgment.

This action was brought by John E. Wade against H. D. Orton.

The facts are stated in the opinion.

Samuel H. Randall, for the motion.

John Henry Hull, opposed.

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ROBINSON, J. — This was an action for slander, commenced in this court in November, 1871, in which defendant was originally held to bail in two thousand dollars, which was reduced to five hundred dollars, and that sum was, by order, deposited with the clerk of this court, in lieu of bail.

The case, after issue joined, and under the provision of the act of 1870 (ch. 582), was subsequently transferred to the marine court, but no order was then made in respect to the sum on deposit with the clerk, nor was any, until June 10, 1872. The cause was tried in the marine court, June 7, 1872, when a verdict for five hundred dollars was rendered for the plaintiff; and the justice before whom the trial was had thereupon ordered judgment in favor of the plaintiff, against the defendant, for five hundred dollars and costs, and twenty-five dollars allowance.

The judge, however, on a motion for a new trial, ordered a stay of plaintiff's proceedings, for twenty days. Judgment for the five hundred dollars damage and one hundred and sixty-nine dollars costs (\$169), was, however, entered by plaintiff's attorney on June 14, 1872, while such stay was pending. On June 10, 1872, defendant and his attorney settled with plaintiff, without notice to, or knowledge of his attorney, for one hundred and forty-six dollars, and obtained from him an acknowledgment of satisfaction of the claim, which was filed with the clerk of the marine court, and satisfaction entered of record. He also obtained a receipt for the amount as in full satisfaction, and also a formal assignment to the defendant of the five hundred dollars recovery, and costs (which operated as a release). Defendant's attorney thereupon without the knowledge of plaintiff's attorney, and upon evidence of the satisfaction of the claim, produced an *ex parte* order from this court (granted by Judge LARREMORE), that the clerk pay over to him the five hundred dollars,

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and received the money from the clerk, which, on receipt, he immediately paid to his client.

The plaintiff's attorney, in addition to his claim for the costs of this action, also alleges he had a lien on or interest in the whole judgment by virtue of a verbal agreement which he says was made when he undertook the prosecution of this suit, that he should hold the claim and any recovery as security for services to be thereafter rendered in that and other matters, and alleges such claims exceed the amount of the recovery.

No notice of any such interest under this special agreement or of any claim to any lien was given by him until June 14, 1872, on the entry of judgment. Without notice by the assignee of any such special interest, any settlement of a controversy between the parties cannot be held to have been in any way fraudulent or made in bad faith on the part of the defendant, simply because the right of the plaintiff's attorney to costs or compensation is disregarded. Some collusion to defraud the attorney must be shown.

In the present case the cause of action being for a *tort* that would not survive, it was not assignable, and the color of claim, which the attorney alleges he acquired by agreement with his client when undertaking the prosecution of the suit, in any future recovery (which, however, is denied by his client), presents no ground for his interference, especially in the absence of any notice to the defendant with the settlement made by his client and the giving of a complete discharge for the damages that were recovered on the trial. No common law lien attaches upon them in his favor as attorney until he has actually received them (*Wait's Ann. Code*, 593, note *n*).

The remaining consideration is whether such settlement, after verdict but pending a stay for a motion for a new trial, was in derogation of the rights of the attorney to such costs as had accrued at the time of the settle-

ment. The case was still *sub judice* on the merits, and it was evidently made by both parties as a relief from a vexatious and harassing personal controversy, in which they had become involved. It is quite apparent that from the personal interests the plaintiff's attorney assumes he had acquired in the controversy (as *dominus litis*), and the zeal and personal feeling he had displayed on this motion in upholding them, his client would have fruitlessly applied for his acquiescence in this settlement.

But I fail to appreciate the duty of the court to regard with disfavor such a withdrawal of a mere personal controversy when made between the parties themselves, although without concurrence of their attorneys and in possible defeat of some right to the costs in the action that they might acquire by a future judgment in their client's favor. On the contrary, "*Interest reipublicæ ut sit finis litium*;" and an attorney prosecuting a claim in court (especially one founded on such uncertain premises as alleged injury to character through slander) ought not to be heard in opposition to any such a compromise made between the parties previous to his having secured a vested right in the recovery, unless it clearly appears that it has been made collusively and with manifest intention of defrauding him of some *certain or vested rights*. Until he has acquired such interest he is (as he ought to be) subject to the direction and control of his employer, and it is certainly not until entry of a final judgment that he has acquired as against the defendant a right to any costs that can or may be awarded in the action (*Haight v. Holcomb*, 16 *How. Pr.*, 173; *Rooney v. Second-avenue R. R. Co.*, 18 *N. Y.*, 368; *Adams v. Fox*, 40 *Barb.*, 442; *McGregor v. Comstock*, 28 *N. Y.*, 237).

In *Shank v. Shoemaker*, 18 *N. Y.*, 489, the court of appeals, in an opinion in which all the judges concurred, held that when a settlement of the action had been

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effected by the clients before judgment, which was claimed to have been in fraud of the right of the attorney to recover costs, that no such right existed, where the claim of the attorney had not been perfected by judgment, and it adds, "There is no case which goes far enough to show, that a party who has not obtained judgment in his favor, cannot settle a suit because it prejudices the possibility or probability that his attorney may obtain costs by a future trial and a judgment in favor of his client" (See also *McDowell v. Second-avenue R. R. Co.*, 4 *Bosw.*, 670; *Pearl v. Robitchek*, 2 *Daly*, 136).

In the present case, at the time of the settlement, a motion before judgment for a new trial upon the judge's minutes (with a stay of proceedings) was pending; judgment had not been entered, nor had the attorney acquired as against the defendant any interest legal or equitable which ought to have interfered with the *bona fide* action of the real parties, or with their complete settlement of the controversy.

Under these views there was no such irregularity in the order made by Judge LARREMORE (because the plaintiff's attorney after settlement of the same was not notified), as should require a disturbance of the order made, and necessitate the application of the money more in accordance with the right of the parties. No substantial injury was thereby done to either client or attorney; the client neither has nor presents any ground of complaint; and upon the considerations stated the attorney has no grievance that requires redress.

The motion is denied with ten dollars costs; and as the motion is made solely in the interest of the plaintiff's attorney, and against the action and interests of his client, the costs must be paid by him.

JOHNSON *against* OPPENHEIM.

*New York Superior Court ; General Term, March,
1872.*

LANDLORD AND TENANT.—COVENANTS.—EVICTION.—
CONSTRUCTION OF LAWS OF 1860, CH. 345.

A clause in a lease requiring the demised premises to be used for a certain business, or for any business not more hazardous as respects fire, than the business mentioned, cannot be construed into a covenant that the premises demised shall be or continue fit for such business.

The rules applicable to various kinds of interference by landlords with tenants, considered and classified.

The erection of a building, by strangers, on an adjoining lot, so as to shut off the light from the windows in demised premises, is not an eviction of the tenants by the landlord.

Under *Laws of 1860*, ch. 345, p. 592, a tenant of premises becoming untenable, is not absolved from paying rent, unless he surrender possession of the premises; and he will be held liable for the whole rent if he retain possession of any portion of them.

Leave to amend a pleading on the trial may be refused, in the discretion of the court; and should never be granted where it would raise a new issue which would operate as a surprise upon a party.

Appeal from judgment entered upon the verdict of a jury, and from order denying defendant's motion for a new trial upon the judge's minutes.

The action was brought to recover thirty-five hundred dollars, a quarter's rent, due November 1, 1869, of the premises, with the buildings thereon, known as No. 475 Broadway, running through to Mercer-street, under a lease of the premises made by the plaintiffs, the owners, to the defendants, dated January 15, 1869,

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for five years from May 1, 1869, at the annual rent of fourteen thousand dollars, payable quarterly.

The lease contains the usual covenant on the part of the defendants, as lessees, to pay the rent, and a covenant on the part of the plaintiffs that the defendants, on paying the said rent reserved, and fulfilling all the covenants and agreements on their part, shall, during the term granted, enjoy and quietly hold said demised premises, without let or hindrance of the plaintiffs, their successors, heirs or assigns, or any other person whatever. It also contains the following provision :

“And the premises hereby demised are to be used in the business of importers and manufacturers of and dealers in cloaks and mantillas, and for any other purpose or business not more hazardous, as respects fire, than the business aforesaid, but for no other business, without written permission first had of the party of the first part, &c.”

The defendants, by their answer admitting the lease, and their entry and occupation of the premises thereunder, down to October 1, 1869, set up for defense :

First. That on October 1, the premises having become untenable, without fault on their part, they surrendered possession ; the principal cause of the injury to the premises having been the improvements on the adjoining property, against which the answer alleges that the plaintiffs did not provide proper or requisite precautions.

Second. That by the improvement of the adjoining premises, certain windows in the north gable wall of the building leased, which were useful and important for the purposes of their business, were closed, and that they surrendered on that account.

Third. The defendants admit their liability for the rent down to October 1, 1869, the date of their al-

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leged surrender, two thousand three hundred and thirty-three dollars and thirty-four cents, and offer judgment for that amount.

The court having awarded the opening and close to the defendants, they gave evidence tending to show that about June 1, 1869, Mr. William C. Rhinelander, the owner of the lot adjoining the premises in question, proceeded to excavate his lot for the purpose of building thereon, but by reason of the defendants' refusal to give the necessary license, the building leased by defendants was not properly shored up; and as the excavation proceeded, the foundation of the north wall gave way in part, and the wall itself and the lower floors of the building were weakened and impaired solely in consequence of the building not being shored up; On August 24, a portion of the ground floor settled a foot or two, and the stairway to the second floor, the ceilings, &c., were more or less disturbed. On that day defendants wrote to plaintiffs, that by reason of the settling down of the floor, the premises had become untenable, and that they should, therefore, be compelled speedily to vacate the premises, and asking with whom and where they should leave the key. Plaintiffs replied that they should decline to receive the key. Defendants continued to occupy the store, being more or less incommoded by the results of the excavation, until October 1, and, meantime, the erection of the building adjoining closed up the windows on the north gable. On September 30, defendants, having moved out their stock of goods, &c., sent the key of the front door of the store on Broadway, by express, to plaintiffs, and wrote them by mail to that effect, stating that they had vacated the premises in consequence of the same having become untenable. Defendants refused to receive the key, and replied by mail, October 2, that they wholly refused to accept any surrender of the premises, or to accept the key, and would hold the

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defendants liable for all rent to accrue under the lease, and denying that the premises had been rendered untenable; but that if they had, it was solely occasioned by the defendants' persistent refusal to allow the property to be shored up and protected against the adjoining excavation.

There was no pretense of any other surrender or attempt at surrender of the premises on the part of the defendants, than this of October 1.

Between the date of the execution of the lease and of the commencement of the term, defendants executed to one Fischer, a manufacturer, a written lease of the entire fourth floor of the building and a portion of the third floor, for the entire period of defendants' term, under the lease. Under this sub-lease, Fischer entered into possession, in May, 1869, of the portion of the premises so leased to him, and continued so to occupy the same and to carry on his business therein, until after the expiration of the quarter for the rent of which this action was brought. When defendants quitted their part of the building, and sent the key of the store to plaintiffs, they left him in possession of the third and fourth floors, and took no proceedings whatever to remove him. It appeared, also, that the key which the defendants sent by express was only the key of the store; that the entrance to the lofts occupied by Fischer was by a separate outer door and stairway on Broadway, to which there was another and different key, and that no offer of this key was made to the plaintiffs. Defendants offered to prove that Fischer had agreed to go out when they did, and that they only received rent from him up to the time they left; but this evidence was excluded as immaterial. When defendants rested, plaintiffs moved the court to direct a verdict in their favor for the whole quarter's rent, insisting that the defendants had proved no surrender. The court so ordered, and defendants excepted.

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Defendant's counsel submitted a series of requests to charge the jury, but the court refused to charge any of them, and defendant's counsel excepted to each refusal separately.

The jury, by direction of the court, found a verdict for plaintiffs for three thousand nine hundred and eighty-five dollars and ten cents.

Defendants then moved for a new trial on the judges' minutes, upon the legal exceptions taken in the course of the trial; on the exceptions taken to the refusal of the court to charge as requested by the defendants; on the exceptions taken to the charge of the court as delivered, and also upon the ground of insufficient evidence to warrant the direction of the court to the jury to render such a verdict, or to warrant the jury in rendering such a verdict.

The motion was denied by the court, and to the decision of the court in that behalf, and each and every part of it, the defendants' counsel then and there duly excepted.

Judgment was thereafter entered upon the verdict; and defendants appealed from the judgment and also from the order denying the motion for a new trial.

John Graham, for defendants, appellants.

Joseph H. Choate, for plaintiffs, respondents.

BY THE COURT.*—FREEDMAN, J.—The covenant for quiet enjoyment contained in the lease means only that the tenants shall not be evicted by a paramount title. It relates only to the title, and not to the actual possession or undisturbed enjoyment, where there is no eviction from the premises demised.

Nor is there any actual or implied contract or war-

* Present—FREEDMAN, CURTIS and SEDGWICK, JJ.

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ranty on the part of the plaintiffs in this case that the premises demised shall be or continue fit for the purposes of defendants' business. The clause contained in the lease, which requires the premises to be used in the business of importers and manufacturers of, and dealers in cloaks and mantillas, or for any business not more hazardous, as respects fire, than the business specifically mentioned, cannot be construed into any such implied contract or warranty (*Howard v. Doolittle*, 3 *Duer*, 464; *Doupe v. Genin*, 1 *Sweeny*, 25; affirmed in 45 *N. Y.*, 119). *Myers v. Burns*, 35 *N. Y.*, 269, is not an authority for the proposition that it should be so construed. In the last mentioned case the landlord had leased the premises "as a first-class hotel," and had covenanted "to keep the *said* hotel and premises in good necessary repair during the term, at his own proper charge and expense."

To defeat plaintiffs' action, therefore, defendants had either to prove an eviction, or to bring themselves within the provisions of the act of 1860; and before the verdict rendered against them pursuant to the direction of the court can be upheld, it must appear clearly that they failed to do either. The defendants had the affirmative of the issue. There being no conflict of evidence, when they rested their proofs, all presumptions and inferences which they could have had a right to ask the jury to draw in their favor from the facts proven, if the case had been submitted to the jury, are to be conceded to them.

The adjudications of this State, bearing upon the general subject of interference by landlords with tenants, may be assorted into three distinct and entirely different classes of cases, the remedy for each class being peculiar to it, viz:

I. Cases where the tenant is evicted without the willful or voluntary agency of the landlord, from the whole or some part of the demised premises; as for example, an eviction of the tenant by title paramount of

a contiguous proprietor. Here, if the eviction is from the whole premises, the tenant is not chargeable with rent; but if it be from a part of the premises, the law, in its inability to impute blame to the landlord for the act of another person, requires the rent to be apportioned, so that the tenant shall be liable to pay for such portions of the premises as he retains (*Moffat v. Strong, Bosw.*, 57; and see *Mark v. Patchin*, 29 *How. Pr.*, 20).

II. Cases where the landlord commits an act or acts of trespass, which interfere, more or less, with the beneficial enjoyment of the premises, but which leave the demised premises intact, and do not deprive the tenant of any part of them, so that, though he may be injured, he is not thereby dispossessed. Here the rule is, inasmuch as the wrongful act of the landlord stops short of depriving the tenant of any portion of the premises, that such trespass is no defense against the liability for rent, and the tenant's sole remedy therefor is an action for damages against the wrongdoer (*Edgerton v. Page*, 20 *N. Y.*, 281; *Lounsbury v. Snyder*, 31 *Id.*, 514; *Cram v. Dresser*, 2 *Sandf.*, 120; *Mortimer v. Brunner*, 6 *Bosw.*, 653; *Peck v. Hiler*, 31 *Barb.*, 117).

III. Cases where the landlord enters willfully upon and expels the tenant, actually or constructively, from a part of the demised premises. Here the rule is, that the whole rent is suspended during the term, though the tenant continue in possession of the residue (*Christopher v. Austin*, 11 *N. Y.* [1 *Kern.*], 216; *Peck v. Hiler*, 24 *Barb.*, 178).

No eviction, actual or constructive, within the decision of any of these cases, has been proved in the case at bar. The right of William C. Rhineland, the owner of the lot adjoining the premises in question on the north, so to improve and build upon his own lot, as to shut up the windows in the north wall of the premises demised to the defendants, there being no question of ancient lights, cannot be disputed; and as the lease contains no covenant against it, the closing up

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of said windows by Rhinelander cannot be tortured into an eviction, actual or constructive, of the defendants from the whole or any part of the demised premises. Even had the plaintiffs themselves owned Rhinelander's lot, and built on such land in such a manner as to obstruct and darken the windows in the premises demised, such act, even if it were a ground for damages, would not have operated as an eviction (*Palmer v. Wetmore*, 3 *Sandf.*, 316; *Parker v. Foote*, 19 *Wend.*, 309; *Myers v. Gemmel*, 10 *Barb.*, 537).

Not having shown an eviction independently of the act of 1860, the next inquiry is, whether defendants have brought themselves within the provisions and purview of that act. Now it is true that the literal reading of the statute is, that if a building, without any fault or neglect on the part of the lessee, be destroyed, or be so injured as to be untenable and unfit for occupancy, the lessee shall not be liable to pay rent after such destruction or injury, unless otherwise expressly agreed, and may quit and surrender the possession. The defendants claim the benefit of such literal reading, and insist that the statute should be so construed as to mean that, whenever the demised premises become untenable and unfit for occupancy, that constitutes an eviction of the lessee, suspending the right of the landlord to rent so long as it lasts, and that, *in addition* to this, the lessee may quit and surrender, and thus absolutely annul the lease; that he has this option, but is not bound to exercise it. But as such literal interpretation would lead to the absurd consequence, in case of the destruction or unfitness of only a comparatively small part of the demised premises, of continuing the lessee in the enjoyment and occupation of the premises, and yet absolving him from all rent, it cannot be adopted. As laws must necessarily deal in generals, and cannot descend to particulars, and as the interpretation of them is the application of them to particular cases, and as the presumption is

against an absurd intent, whenever the words, taken in their ordinary sense, would lead to such a consequence, it is the duty and province of the courts to so far restrict their meaning as to avoid such a consequence. DOMAT says upon this point: "Whenever it happens that the sense of a law, how clear soever it may appear in the words, would lead us to false consequences, and to decisions that would be unjust, if the law were indifferently applied to everything that is contained within the expression, the palpable injustice that would follow from this apparent sense, obliges us to discover by some kind of interpretation, not what the law says, but what it means, and to judge by its meaning how far it ought to be extended, and what are the bounds that ought to be set to its sense."

The interpretation here referred to is to be guided again by certain well established rules, and one of the most prominent of these, and one which helps us most in the discovery of the true meaning of the law, is the reason of the law, or the cause which moved the legislature to enact it. This ought not to be confounded with the mind of the law; for that is nothing but the genuine meaning of it, for the finding out of which we call in the reason of it to our assistance.

Another rule is that, in case of doubt, a statute consisting of divers parts or clauses is to be judged by looking at the whole, and to be construed so as to carry out the intention of the law-making power. The whole context may be considered, in endeavoring to collect such intention, although the immediate object of the inquiry be the meaning of an isolated clause. The reason and spirit of cases, therefore, make the law, and not the mere letter.

Now what was the reason for the passage of the statute in question, and the main intent of the legislature in enacting it? At the time of such passage, the law was firmly settled, by a long series of adjudications in the English courts as well as our own, that up-

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on a lease for years, with a covenant to pay a stipulated annual rent, the rent is payable by the lessee to the end of his term, though the property be destroyed by fire, and that the lessee has no relief against an express covenant to pay the rent, either at law or in equity, unless he has protected himself by a stipulation in the lease, or the landlord has covenanted to rebuild. This rule operated so harshly in many cases that, as is well known, the legislature interfered by the passage of the act now under consideration. The act, in the absence of a written agreement or covenant to the contrary, reverses the prior rule of law, and affords relief not only against fire, but against elements generally, and any other cause, by which the building may be so far injured as to be untenable and unfit for occupancy. But it makes no apportionment or division of the building, or of its destruction, untenableness or unfitness. Consequently, so long as the lessee remains in possession and use of a part of the building, it is conclusive evidence as against him that it has not been destroyed, and that it is not untenable or unfit for occupancy, within the meaning of the act.

In order to give due weight and effect to these various considerations, which have been noticed, it must be taken to have been the true intention of the legislature to absolve the lessee, in the cases contemplated by the statute, from the payment of rent, provided he avails himself of the privilege given to quit and surrender possession of the leasehold premises, and of the land so leased or occupied. The reason and purpose of the law, and the nature of the grievance it was designed to remedy, forbid us, as the respondents have correctly argued, to construe the two clauses of the statute independently of each other, or to give the lessee the benefit of the relief from the rent except upon the condition of his quitting and surrendering the possession.

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It remains, therefore, to be considered, whether the defendants have quitted and surrendered such possession. According to the evidence, the defendants forwarded the key of the outer door to the store on the first story, to the plaintiffs, by express, and at the same time, September 30, 1869, advised plaintiffs of it by letter, through the post-office. Plaintiffs acknowledged the receipt of the letter under date of October 2, 1869, and absolutely refused to accept any surrender of the premises, or the key, upon the ground that the premises were not untenable, and that, if they were, it was the fault of the defendants in consequence of their persistent refusal to allow the building to be protected against the consequences of the excavation on the adjoining lot. Plaintiffs also notified defendants that they, the defendants, would be held liable for all rent to accrue under the lease. If the surrender was complete in fact and sufficient in law, the reasons assigned by plaintiffs for their refusal to accept it are wholly immaterial. If incomplete and insufficient, defendants were not relieved by any of the grounds upon which plaintiffs based their refusal, or the manner of such refusal, from the necessity of making an effectual surrender. The evidence further showed that the defendants had executed a written lease for the whole unexpired term of their own lease to one Fischer, of the fourth, and part of the third story of the building in question; that under this sub-lease, Fischer had entered into possession and was engaged in the manufacture of tassels and fringes, upon said premises, and employed fifteen or twenty people in that business; that at the time of defendants' removal from the building, they left Fischer behind, in the occupancy of the parts leased to him, and that he remained in the occupation and full enjoyment of those parts for a month or two after October 1, 1869. It also appeared that defendants took no proceedings whatever, to remove Fischer; that the key sent by them by express was

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only the key of the store ; that the entrance to the upper stories occupied by Fischer was by a separate outer door and stairway on Broadway, to which there was another and different key, and that no offer of this key was made to the plaintiffs. As Fischer's title was good against the plaintiffs, and his continued occupation constituted, in judgment of law, possession by the defendants, the surrender made by the latter of the key of the store, leaving Fischer in possession of the upper part of the building, was no surrender, in law or in fact, of the possession of the leasehold premises, and of the land covered by their lease, within the meaning of the act of 1860. The defendants, therefore, continued liable on their covenant to pay the rent.

As a necessary corollary, defendants' offer to prove that Fischer agreed to go out with the defendants, that pursuant to an arrangement made with him he had no longer any right to continue the occupation, and that they declined to receive rent from him after their own removal, were properly excluded as immaterial. No agreement, understanding, or dealings between them and Fischer could amount to a quitting and surrender of the possession, so long as Fischer remained actually in, and so long as his possession was their possession and not the plaintiffs.

The views so far expressed render it unnecessary to inquire whether or not the defendants were precluded by their refusal to allow the building to be shored up, from invoking the benefit of the act of 1860.

The denial of defendants' motion, at the trial, for leave to amend the answer by the insertion of a defense of fraud by plaintiffs in the procurement of defendants' execution of the lease in question, was a matter not only resting in the sound discretion of the court, but perfectly proper under the circumstances. A motion for leave to set up a new and separate defense and to raise an entirely new issue, the granting

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of which would operate as a surprise upon the plaintiffs, should never be allowed at the trial.

The judgment and order appealed from should be severally affirmed, with costs.

CURTIS and SEDGWICK, JJ., concurred.

VAN VEGHTEN *against* HOWLAND.

Supreme Court, Third District; Special Term, July, 1872.

PRELIMINARY INJUNCTION RELUCTANTLY GRANTED.—
DISSOLVED WHEN TRIAL IS DELAYED.

A preliminary injunction should not be granted in every case where plaintiff shows a *prima facie* case of probable right to a final injunction. The object of a preliminary injunction is merely to prevent such acts during the litigation as would preclude the court from giving relief at the end. It should be granted, so to speak, reluctantly, and should not be allowed where its effect is to give the plaintiff the principal relief he seeks, without ever bringing the cause to trial.

Motion to dissolve injunction.

John A. Van Veghten brought this action against Gardner Howland and others, and obtained a preliminary injunction, upon facts stated in the opinion, and defendants now moved to dissolve it.

E. K. Furman, for the plaintiff.

R. A. Parmenter, for the defendants.

LEARNED, J.—This is a motion to dissolve an injunction. The action was commenced in July, 1871, to restrain the defendants from rebuilding a dam constructed by them in the Hudson river; to compel the removal of the same; and to recover damages. The in-

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juries alleged by the plaintiff are, that the construction of the dam will cause the waters of the Hoosic river to set back along lands of plaintiff; that ice formed in the Hoosic will accumulate on the dam, and will cause some fifteen acres of the plaintiff's land to be submerged, and other ice to flow over these fifteen acres; and that a water privilege of the plaintiff will be destroyed by the back water caused by the dam. An injunction was thereupon granted in July, 1871, which the defendants now move on affidavits to dissolve.

The injunction restrained the defendants from erecting the dam; and it will be seen, therefore, that, so long as the injunction continues, the plaintiff has practically succeeded in the action.

It is not disputed that the defendants own the land where the dam is built, or have a license to build it thereon. Nor is it claimed that the water privilege of the plaintiff is now used. The plaintiff's ground of action, therefore, is based only upon the injury to the water privilege which he may use, and upon the injury to his land by overflow and ice. Upon the question of fact in respect to these alleged injuries, there is some conflict.

But before examining the question of fact, I propose to consider whether, if the plaintiff's allegations be taken most favorably for him, this is a case for a preliminary injunction.

There is a distinction between a preliminary and a final injunction (*Murray v. Knapp*, 42 *How. Pr.*, 462). While the Code has attempted to define the cases in which preliminary injunctions may issue, I do not understand the definition as intended to lay down a new principle; unless, indeed, in the last clause of section 219. The Code is a code of practice, not designed to introduce new principles of jurisprudence. Looking back, then, at the settled rules of equity, we shall find that, while final injunctions are matters of right, preliminary injunctions are matters of discretion (*New York Printing Co. v. Fitch*, 1 *Paige*, 97; *Ogden v.*

Kip, 6 *Johns. Ch.*, 160). Their object is to prevent such acts during the litigation as would preclude the court from giving the plaintiff his remedy at the end. If they have in recent times been granted more liberally, such a course has been incorrect in principle, and of evil tendency. They should be granted with great caution, and, if I may use the expression, *reluctantly*. When a plaintiff shows that he will be entitled to a final, it does not necessarily follow that he is entitled to a preliminary injunction. Such an injunction should not be granted or sustained, unless without it, the court could not, by its final judgment, do justice between the parties.

The reason of this is obvious. The plaintiff, in order to recover, ought to succeed on a *trial*, and it is the right of the defendant to have a *trial* (*Thompson v. Erie R. R. Co.*, 45 *N. Y.*, 472). But preliminary injunctions are granted usually *ex-parte*, and always on affidavits. Where the preliminary injunction restrains the defendant from doing the very acts, to restrain which the final judgment is sought, then the plaintiff has practically succeeded without a trial, and at the very beginning of his case. He need do nothing more than to delay the action as much as possible. Such is the present case. The defendants are restrained from building their dam, pending the action. If the action is never tried, the plaintiff has succeeded.

Is there, then, any necessity in this case that the defendants should be thus restrained pending the action? If the plaintiff succeeds on the trial, he will be entitled to a judgment restraining any further building of a dam, and requiring the defendants to remove whatever shall have been built during the litigation, and previously thereto. If the defendants go on to build during this litigation, they will do so at their own peril, and at the risk (if they are wrong) of being compelled to restore the river to its former condition. And I do not understand that the erection of the dam will do

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any irreparable injury which its removal will not take away. They will be liable also to make compensation to the plaintiff for all damages. Will there be any difficulty in estimating these damages? I think not. The water privilege is not used, and it is not alleged that the plaintiff is about to use it. Indeed, it is alleged by the defendants that the shore opposite the plaintiff's land belongs to another, and that the plaintiff does not possess the right to abut a dam thereon. While, therefore, if this water privilege is injured, the plaintiff may be entitled to such a judgment as will remove the injury, yet the temporary damages to the removed water privilege must be of inconsiderable amount. The other damages are those occasioned by the overflowing of fifteen acres of land with water, and the covering them with ice. There seems to be no difficulty in estimating the amount of damage thus done, and in compensating therefor in money.

On the other hand, if this preliminary injunction stands, and yet on a final hearing the court should decide in favor of the defendants, it may be that they will have suffered largely in their business from a deficiency of water to their mill—damages very difficult to compute. Why then, during this litigation, should they not go on with this erection on their own land, subject to the risk of a final judgment against them, especially as it is not suggested that they are irresponsible.

The examination of the merits of this litigation on affidavits must be unsatisfactory. There is no cross-examination of witnesses; and the affidavits of opposing experts are always unfavorable to a high estimate of the precision of scientific knowledge.

Without, therefore, expressing any opinion on the merits of the controversy, I think that, for the reasons stated, the plaintiff does not need for his protection a preliminary injunction, and that the injunction granted should be vacated, with costs of motion.

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ABBOTT *against* THE NEW YORK CENTRAL,
&c., RAILROAD COMPANY.*Superior Court of Buffalo; General Term, May, 1872.*ACTION FOR PENALTY.—FORM OF SUMMONS.—PLEAD-
ING IN PENAL ACTIONS.—REMEDY FOR
IRREGULARITY.

The summons and complaint in an action to recover a statute penalty should not be set aside merely because the summons is framed under subdivision 2 of section 129 of the *Code of Procedure*, and gives notice of an intention to apply to the court for relief, instead of to the clerk for judgment under subdivision 1.

It seems, that the provisions of 2 *Rev. Stat.*, 480, § 1,—authorizing a short mode of pleading in penal actions, by referring simply to the statute on which the action is founded,—is repealed by the *Code of Procedure*, which requires the facts constituting every cause of action to be alleged.

If an action for a statute penalty can, under the *Code*, be deemed an action on contract, the proper way of objecting to the use, in such an action, of a summons “for relief,” instead of a summons “on contract,” is not by setting aside the summons or complaint, but by an application for relief after judgment, if the judgment obtained be one to which plaintiff is not entitled.

Appeal from an order.

Wilson S. Abbott sued the New York Central & Hudson River Railroad Company in the Buffalo superior court. The facts are stated in the opinion.

James W. Willett, for defendants, appellants.

George W. Cothran, for plaintiff, respondent.

BY THE COURT.*—VERPLANCK, Ch. J.—This is an

* Present, VERPLANCK, Ch. J., and SHELDON, J.
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appeal from an order denying a motion to set aside the summons and complaint in this action, on the ground that the summons was issued under subdivision 2 of section 129 of the Code of Procedure, the action being to recover a penalty forfeited by the defendants under the provisions of an act of the legislature to prevent extortion by railroad companies, passed in 1857, as appears by an indorsement on the summons, and as also appears by said complaint.

It is very doubtful whether an appeal lies from the decision of the special to the general term in this case. It can only be sustained upon the ground that it affects a substantial right of the defendant. How can any substantial right of the defendant be affected by the refusal of the special term to set aside the summons and complaint? If they are retained, and the defendant does not answer, the demand against the defendant will be passed upon by the court instead of the clerk of the court; and if a proper decision is not made, he is entitled to an appeal from the judgment ordered; a right which is not given if an erroneous decision is made by the clerk. In the latter case, the party would be driven to protect himself by a motion, and the matter would then be passed upon finally by the court. I shall, however, dispose of this motion upon the merits.

By section 1 of article 1 of chapter 8 of title 6 of part 3 of the Revised Statutes, it is provided, that "When a pecuniary penalty or forfeiture is specially granted by law to any person injured or aggrieved by any act or omission of another, the same may be sued for and recovered in an action of debt or in an action of assumpsit." And by section 9 of the same article it is provided, that "Whenever an action of assumpsit shall be brought for the recovery of any penalty given by any statute, it shall be sufficient, without setting forth the special matter, to allege in the declaration that the defendant, being indebted in the amount of

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such penalty, referring to the same," &c., . . . "undertook and promised to pay the same."

In deciding the case of the *People v. Bennett*, 5 *Abb. Pr.*, 384, and the appeal in same, 6 *Id.*, 343, the court regarded these provisions of the statute as declaring and establishing that an action for the recovery of a penalty given by a statute, was and must be an action founded upon an implied contract growing not out of the stipulation, but out of the acts of the parties; but it is submitted that these statutes are only permissive, and that before the Code an action on the case would have been sustained to recover such penalty or forfeiture. The law has never declared, and no judge or court, except in the cases cited, has ever claimed, that a penalty given to a party on account of extortion practiced upon him was an action arising upon contract. *Bigelow v. Johnson*, 13 *Johns.*, 428; *Cole v. Smith*, 4 *Id.*, 193. I do not, therefore, think that the claim for which this action was brought, even with the aid of those statutes, was a cause of action arising upon a contract.

But with due respect to the learned judge who decided the case of the *People v. Bennett*, and who wrote the opinion in the same case, on appeal, I think the permissive statutes to which I have referred are repealed by section 140 of the Code, and are not saved by section 471, and that the decision in the case of *Morehouse v. Crilley*, 8 *How. Pr.*, 431, was correct, and should not have been disregarded. The great object of the Code was to simplify pleading, and to compel a complaint to contain a plain and concise statement of the facts constituting the cause of action, and to do away with forms, which the common law and our statutes had adopted, and allowed in pleading, and which did not state the facts of the case.

The statutory form upon this claim would require the statement in the complaint, only that the defendant

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was indebted to the plaintiff in the sum of fifty dollars, under the provision of section 1 of chapter 185 of the law of 1857, and by referring to that same law under which the action was brought. A greater fare than that allowed by law had been asked and received by the defendant, but where or when, or over what portion of its road, could not be ascertained either by an examination of the complaint or the summons, nor could the defendant, under section 160 of the Code, require the plaintiff to make his pleading more definite or certain, because it is regulated by the Revised Statutes, and not by the Code. It seems to me, therefore, that the pleading under the statute is inconsistent with the provision of section 142 of the Code, and is not saved by section 471.

Again, I think the order appealed from should be affirmed, because the granting of it would have discontinued this action, and no judgment could have been rendered.

The defendant should wait and see whether the plaintiff entered a judgment in the action to which he was not entitled; and if he did, it would then be proper for the defendant to move for such relief as he would be entitled to.

The case of the Bank of Genesee v. Patchin Bank, (13 N. Y. [3 Kern.], 309), simply decided a rule of evidence. The question was, whether the answer denying merely the allegations of the complaint, and failing to plead that the plaintiff was such a corporation as alleged in the complaint, it was necessary for the plaintiff to prove its incorporation; and the court held that, under 2 Rev. Stat., 458, § 3, it was not necessary, and that said section 3 had not been abolished by the Code; and this was plainly right, for there is nothing in this section inconsistent with the rules of pleading established by the Code. It only regulates a question of proof; and so in the case of Johnson v.

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Kemp, 11 *How. Pr.*, 186, cited by BEARDSLEY, in *People v. Bennett*, the court held that section 13 of title 4 of chapter 8 of part 3 of the Revised Statutes was not repealed by the Code, but that section only provided that in actions by or against any corporation established under the laws of this State, it should not be necessary to recite the act of incorporation, but it should be sufficient to recite the title of such act, and the date of its incorporation. There is nothing in this section inconsistent with the provisions of the Code, and it is, therefore, saved by section 471. It regulates only the manner of stating the legal existence of the party, and the capacity to sue, and not the matter which constitutes a cause of action of such a party. The case of *Bank of Waterville v. Beltzer*, 13 *How. Pr.*, 270, follows and affirms the cases before cited; and the case in 2 *Duer*, upon demurrer, only holds that said section 13 is not repealed.

The order must be affirmed, with ten dollars costs.

Ordered accordingly.

 FOSTER *against* TOWNSHEND.

New York Common Pleas; Special Term, March, 1872.

AUTHORITY OF RECEIVER WITHOUT DEED FROM DEBTOR.—JOINDER OF PARTIES.

Under chapter 314 of the *Laws of 1858*,—authorizing receivers and other trustees to disaffirm acts in fraud of the estate,—a receiver appointed in an action, for the purpose of enforcing payment of money awarded therein, may bring an action to set aside the debtor's fraudulent conveyance of his property, although no assignment to the receiver has been made by the debtor.

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In such a suit, all parties claiming an interest in the land or who united in the illegal act, may be made parties defendant.

Demurrer to complaint.

This action was brought by John A. Foster, as receiver, against John Townshend, John Wythe and others.

ROBINSON, J.—The plaintiff was, in 1867, appointed receiver in an action for a limited divorce, instituted in this court by Mary Carey against her husband, Thomas W. Carey, of all his estate real and personal, for the purpose of enforcing payment of alimony. At that time he was the owner of a lot of ground in the city of New York, but after the appointment of plaintiff as receiver, no conveyance thereof was made to him as might have been required. In violation of the injunction, the defendant, Thomas W. Carey, conveyed the lot to John Wythe, and took back a consideration money mortgage for one thousand dollars, of which the defendant, Townshend, has become assignee; but it is alleged that both Wythe and Townshend acquired their interests in the land and mortgage with full notice of the rights of plaintiff, as receiver, and in fraud thereof.

To this complaint, the defendant, Townshend, has demurred, on the ground that it does not state facts sufficient to constitute a cause of action, in not alleging any conveyance of the lot to the receiver, for the purpose of his trust.

In the state of the law prior to the act of 1858, ch. 314, a common law receiver of real property without conveyance might well have been held to have been possessed with no such title or interest in it as would have authorized him to maintain an action to remove a cloud upon, or obstruction to his right as receiver, to collect the rents, make leases and compel the attornment of tenants (3 *Dan. Ch. Pr.* 441; *Mitchell v. Bunch*,

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2 *Paige*, 606-615; *Edw. on Receivers*, 6). Much controversy has existed on the subject of the peculiar power of a receiver under a creditor's bill (2 *Rev. Stat.*, 174; *Ch. Rules*, 1837, No. 192; *Eq. Rules*, 1857, No. 134); and under the Code (§§ 292 to 298 on Supplemental Proceedings; *Chatauque Co. Bank v. White*, 6 *N. Y.* [2 *Seld.*], 236; *Porter v. Williams*, 9 *N. Y.* [5 *Seld.*], 142; *S. C.*, 12 *How. Pr.*, 104; *Moak v. Coats*, 33 *Barb.*, 498; affirmed in court of appeals, 33 *How. Pr.*, 618; *Chatauque Co. Bank v. Risley*, 19 *N. Y.*, 369). By the act of 1858, above referred to, the doubt on this was removed. By section 1, a receiver is authorized, for the benefit of the party in whose interest he is appointed, to disaffirm, treat as void, and resist, all acts done, transfers or agreements made in fraud of the rights of such person in any property held by him, or belonging to his trust; and, by section 2, any person who in fraud of such party in interest, has received, taken, or in any manner interfered with such estate or property, is liable, in a proper action, to such receiver, therefor.

Under the allegations of the complaint, it cannot be doubted that the conveyance to Wythe, and mortgage by him to Townshend, with notice of the injunction and of the rights of Mrs. Carey, as asserted in her action, tended to defeat and impair them, and created such a cloud on the receiver's title and right of possession, with the incidental authority to compel an attornment by the tenants, and to make and execute leases of the property, as justified the interference of the court in the exercise of its equitable jurisdiction. The violation of the injunction was against the prohibition of the statute (2 *Rev. Stat.*, 534, § 1, subd. 3, 8, § 25); and all persons concerned or participating, were guilty of misdemeanor (*Id.*, § 26; 2 *Rev. Stat.*, 696, § 39). The acts of the defendant as charged in the complaint, constituted a willful violation of the injunction; were prohibited by law; and being in derogation of plaintiff's

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rights as receiver, were void. Under the act of 1858, the plaintiff is authorized to take the necessary steps for their disaffirmance, and to remove the cloud that has been created on his title as receiver, so far as is necessary to protect Mrs. Carey's rights, and to that end to compel such complete transfer to him, in trust for the purposes of the suit, of the interest the defendant, Thomas W. Carey, has in the lot in question, which has not been transferred to any *bona fide* purchaser.

Another ground of demurrer is presented: that improper causes of action are united in seeking relief against all parties concerned in or deriving title through the illegal act of conveyance to John Wythe. This cannot be maintained. The inquiry into the validity of the attempted transfer of title, and of each particular transaction in that respect, necessarily involved the validity of the title of each of the several defendants who claimed an interest in the lot, under the conveyance to Wythe.

A further ground of demurrer is stated (*Code*, § 144, subd. 4), that there is a defect of parties in omitting to make the attorney-general a defendant.

He could only become such where it appeared that the title to the lot had *escheated* to the State, 1. From a failure of lawful heirs (1 *Rev. Stat.*, 718, § 1); and, 2. In case of a void devise; as where it was to aliens, incapable of taking by will (2 *Rev. Stat.*, 57, § 4). The complaint presents no such case of *an escheat*, nor any reason for making the attorney-general a party.

Under these considerations, the complaint must be held as sufficient, and judgment must be given on the demurrer in favor of the plaintiff, but with leave to the defendant to answer, on payment of the costs of trial on demurrer, within ten days after service of a copy of an order to be entered herein.

Decision accordingly.

GREEN *against* THE NEW YORK CENTRAL
RAILROAD COMPANY.*New York Common Pleas; General Term, July, 1872.*

COMMON CARRIERS.—CONNECTING LINES.—PASSENGERS' BAGGAGE.—EVIDENCE.—RES GESTÆ.

A railroad company is not liable for a passenger's baggage lost by a connecting steamboat line, even though the company has given a check for the baggage to the terminus of the steamboat line, unless the company have some interest in or control over the carriage of passengers by such boat line.*

In order to sustain an action against a railroad company for the loss of plaintiff's baggage upon a steamboat forming part of a connecting line, the plaintiff must show some community of interest in, or some control over, the carriage of passengers by such boat line.

Proof that the railroad company checked the baggage to the terminus of the boat line, although there be evidence that they did so for their own convenience, without proof that the passenger paid them his fare for passage by the boat, is not sufficient.

The statute (*Laws of 1847*, ch. 270, § 9),—regulating the liability of a railroad company receiving freight to be transported by it to a point on a connecting road,—cannot be extended so as to cover the case where the connecting route is a steamboat line.

* The principles applicable in the case of passengers' baggage are somewhat different from those which govern in the case of freight (see *Sprague v. Smith*, 29 *Vt.*, 421; *Hood v. N. Y. & New Haven R. R. Co.*, 22 *Conn.*, 1). In the former, the liability for baggage is incidental to the contract for carriage of the passenger; and in the case in our text, there was no contract on the part of defendants to carry the plaintiff, except to Albany.

In addition to the cases referred to in our note to *Manhattan Oil Co. v. Camden, &c. R. R. Co.*, 5 *Abb. Pr. N. S.*, 289, see *Lamb v. Camden & Amboy Co.*, 46 *N. Y.*, 271; reversing 2 *Daly*, 454; and cases cited; *Angle v. Miss. & Mo. R. R. Co.*, 9 *Iowa*, 487; *Ill. Central R. R. Co. v. Copeland*, 24 *Ill.*, 332; *Same v. Johnson*, 34 *Id.*, 389; *Same v. Franklinberg*, 54 *Id.*, 89; *Nashua Lock Co. v. Worcester R. R. Co.*, 2 *Am. Rep.*, 242.

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It seems, that a railroad company has not implied power to bind itself by a contract for the delivery of passengers or baggage at a point beyond its route, by means of a connecting line of steamboats.

An admission by the superintendent of a railroad company, on the presentation of a claim for lost baggage, that the claim is a good one, is not competent evidence against the company in an action to recover for the loss.

Appeal from a judgment.

Andrew W. Green sued the New York Central Railroad, in the New York common pleas, to recover against the defendants, as common carriers, for the loss of plaintiff's baggage while he was a passenger on defendant's road, which the complaint alleged extended from Little Falls to New York city.

On the trial, it appeared that the defendants were a corporation operating a railroad for the transportation of freight and passengers between Buffalo and Albany (*Laws of 1853*, ch. 76), and also a branch line running from Schenectady to Athens, on the Hudson river. In September, 1867, plaintiff, at Little Falls, applied for a check for his trunk by way of Albany and the People's Line of Steamers, to New York city, that being the way he proposed to go himself. The request was refused, on the ground that the rules of the company would not allow it, which was the fact. On the plaintiff's inquiring if an exception could not be made to oblige him, the station agent told him he would like to oblige him, but could not on account of the rules of the company; that he would check the trunk to Albany, and the plaintiff could have it rechecked there. The People's Line of Steamers was running two lines of steamers. One boat went to Athens, and the other boat went to Albany, but not connecting with defendant's road. The plaintiff then consented to checking the trunk to Albany; but, on examination, no Albany check could be found. The agent proposed to mark the trunk

for Albany, but the plaintiff declined. The agent suggested that the plaintiff allow the trunk to go by the way of Athens, as it would reach New York the same time as by the way of Albany, to which the plaintiff assented, and he received a check for the trunk to New York by the way of Athens. This check was one belonging to the People's Line of Steamers, and was stamped as follows: "New York, People's Line of Steamers, No. 5, Little Falls."

It did not appear on the trial that there was any partnership or community of interest between the defendant and the People's Line of Steamers, but it was shown that the two companies were in the habit of exchanging checks.

The plaintiff paid no fare or passage money nor engaged any passage at Little Falls for any place, but when on the defendants' cars, on the way to Albany, paid his fare to that place. Defendants delivered his trunk to the Peoples' Line at Athens, but it was lost or destroyed the next day by the sinking of their steamboat "Dean Richmond," on her passage from Athens to New York.

Plaintiff first presented a claim for his loss to that line, but afterwards made a claim against the defendants for the value of his lost baggage. On the trial he was permitted to testify, against defendants' objection and exception, that on its presentation to defendants' superintendent, that person said, "You (plaintiff) have a very good claim."

A motion to dismiss the complaint was made, which was denied, and an exception taken. A verdict was rendered for seven hundred and seventy-seven dollars and eighty-two cents, for the value of the lost baggage, and the exceptions ordered to be heard in the first instance at general term.

Theron R. Strong, for defendant, appellant.—I.

Green v. N. Y. Central R. R. Co.

The rule is well settled that independent of statute, a carrier receiving property which is to be transported beyond his own line, discharges his responsibility by carrying it over his own route, and delivering it to the next carrier on the way to its destination (*Van Santvoord v. St. John*, 6 *Hill*, 157; *Hempstead v. N. Y. Central R. R. Co.*, 28 *Barb.*, 485; *Salinger v. Simmons*, 2 *Lans.*, 325; *S. C.*, 57 *Barb.*, 513; *M'Donald v. Western R. R. Corporation*, 34 *N. Y.*, 497; *Dillon v. N. Y. & Erie R. R. Co.*, 1 *Hill.*, 231; *Jacobs v. Hooker*, *Edm. Cas.*, 472; *Pratt v. Ogdensburgh & L. Champ. R. R. Co.*, 102 *Mass.*, 557; *Darling v. Boston & Worcester R. R. Co.*, 11 *Allen*, 295; *Gass v. N. Y., Providence & Boston R. R. Co.*, 100 *Mass.*, 26; *Nutting v. Connecticut R. R. Co.*, 1 *Gray*, 502; *Judson v. West. R. R. Co.*, 4 *Allen*, 520; *Perkins v. Port Saco & Ports. R. R. Co.*, 47 *Me.*, 573; *Brintnall v. Saratoga & Whitehall R. R. Co.*, 32 *Vt.*, 665; *McMillan v. M. S. & N. I. R. R. Co.*, 16 *Mich.*, 119, 120; *Hood v. N. H. & N. Y. R. R. Co.*, 22 *Conn.*, 1; *Bowman v. Hilton*, 11 *Ohio*, 303; *Bissell v. Price*, 16 *Ill.*, 408; 2 *Redf. on Railways*, 112, 123). In cases of connecting railroads, it is provided by statute, that "whenever two or more railroads are connected together, any company owning either of said roads, receiving freight to be transported to any place on the line of either of the said roads so connected, shall be liable as common carriers for the delivery of such freight at such place" (*Laws of 1847*, ch. 270, p. 298). This statute recognizes the rule at common law as above stated, and was designed to modify it as to connecting railroads, to which alone it is applicable. It has no application to a case of connecting routes of transportation by other modes, or by a railroad and steamboats. Nor is this statute applicable to any case unless the facts requisite to constitute the liability are averred in the complaint (*Hempstead v. N. Y. Central R. R. Co.*, 28 *Barb.*, 502).

Charles M. Da Costa, for the plaintiff, respondent.—I. Whether or not the defendant's line extended all the way to New York was immaterial, for the rule is now well settled in our State that, when several separate carriers, owning distinct portions of a continuous route, between two termini, employ the same agents to sell passage tickets, and to receive baggage to be carried over the entire route, an action may be maintained as against one of them for loss of baggage received at one terminus to be carried on the whole route (*Hart v. R. & S. R. R. Co.*, 8 *N. Y.* [4 *Seld.*], 37; *Quimby v. Vanderbilt*, 17 *Id.*, 306). See also the article entitled "*The responsibility of common carriers beyond their own lines*," in the *Albany Law Journal*, vol. 3, p. 485, where all the authorities, English and American, are cited and ably commented on.

II. Whether the plaintiff did or did not pay his fare on the day in question, was entirely immaterial. The defendants would still be liable. For the delivery of a trunk into the possession of a railroad station master at his station, for transportation, and his reception of the same for that purpose, imposed upon the corporation the obligation of a common carrier, even though the passenger go by another conveyance. In the latter case, however, the carrier receives the baggage as freight, and has a lien for his charges thereon. In the case of the *Elvira Harbeck*, 2 *Blatchf. C. Ct.*, 336, 339, the court (NELSON, J.) said: "In cases where the passenger accompanies his baggage, the fare charged for his passage includes compensation for its transportation, and the carrier becomes responsible for its safe delivery. If the passenger does not accompany it, the carrier may claim compensation in advance for its transportation, or may postpone his claim till the delivery, and rely on his lien, or on the personal responsibility of the owner. And I do not see why the rule

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of responsibility for the safe-keeping and delivery should not be the same in both cases. The actual payment of the freight in the one case, and the actual liability and lien for its payment in the other, constitute the consideration for the undertaking." And the above doctrine was cited with approval and followed by the supreme court of Maine, in a case somewhat similar to the case at bar (*Wilson v. Grand Trunk Railway Co. of Canada*, 57 *Maine*, 138).

BY THE COURT. — ROBINSON, J. — There was no proof to maintain the issue raised by the pleadings, that defendants were common carriers of passengers and their baggage, between Little Falls and *New York*, or that they had any authority, as a corpoartion, to contract for the carriage of passengers or their baggage by steamboat, on the Hudson river. Although forming a connecting line with the Peoples' Line of steamboats, running from Athens to New York, there was no evidence of the existence of any agreement between defendants and that line, by which they had any community of interest in, or management or control over, the carriage of passengers on the Hudson river, either from Albany or Athens to New York, by force of which, had they been carriers at large, they would, within the principle of *Champion v. Bostwick* (18 *Wend.*, 175), have been liable for the default of their associates.

As a general rule, the responsibility of a railroad corporation (such as the defendants'), established for the transportation of freight or passengers between certain places, commences when the freight or passenger is accepted for transportation, and terminates by a safe delivery at the end of the route; and it is not liable, except as a forwarder, for goods marked or shipped for a remoter point, unless it is authorized to make a contract extending its liabilities and contracts accordingly

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(*Redf. on Railways*, §§ 181, 183; *Burroughs v. N. & W. R. R. Co.*, 100 *Mass.*, 26; *Hempstead v. N. Y. Central R. R. Co.*, 28 *Barb.*, 485; *Dillon v. N. Y. & Erie R. R. Co.*, 1 *Hill.*, 231; *Johnson v. N. Y. Central R. R. Co.*, 33 *N. Y.*, 610; *Sallinger v. Simmons*, 2 *Lans.*, 497; *Root v. Great Western R. R. Co.*, 45 *N. Y.*, 524; *Straiton v. N. Y. & N. Haven R. R. Co.*, 2 *E. D. Smith*, 184).

In the absence of any express contract to carry the plaintiff or his baggage to New York, or of evidence of defendants being common carriers between Athens and New York, *via* the Hudson river, the mere fact of their affixing to plaintiff's trunk a baggage check of the Peoples' Line, furnished no proof by way of implication of any assumption of such duty. No fare was received for his passage to New York, nor any agreement made to carry his trunk as freight. It was accepted as baggage and as an incident to his becoming a passenger on defendants' road to Albany, and the undertaking to carry it to Athens and there deliver it to the Peoples' Line, was a substituted service agreed on by the parties.

Under the general railroad act (3 *Rev. Stat.*, 5 ed., 634, § 34), the plaintiff might have insisted upon a check on defendants' road to Albany, but accepted one of the steamboat company, which was only properly issuable when the passenger purchased a through ticket of that line to New York, on their steamboats (see subsequent act of 1868, ch. 573; 7 *Rev. Stat.*, Edmond's ed., 317, which recognized previous practice and obligations). If he became a passenger on their boat at Albany, the liability of that company probably attached; if not, he became liable to them, and not to defendants, for freight on the trunk from Athens to New York.

By the act of 1847 (ch. 270, § 9), "whenever two or more *railroads* are connected together, any company

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owning either of said roads receiving freight to be transported to any place on the line of either of said roads so connected, shall be liable as common carriers for the delivery of such freight at any such place." But there is no other provision of law authorizing a railroad corporation so to contract for the carriage of a passenger by any steamboat line, or vessel connecting with or starting from any place to which such railroad may run, or have indirect connection by or through other railroads. Such a construction of their ordinary powers would enable them to become common carriers over the whole globe, free from the contracted limitations of their charter, or of the general prohibition of the statute (1 *Rev. Stat.*, 600, § 3) against their exercising other powers than those expressly conferred by their charters, or necessary to the exercise of those enumerated and given.* In my opinion, defendants did not, and if they did, had not the power to contract for the carriage of plaintiff's trunk on the Hudson river, but fully discharged every obligation by its delivery to the Peoples' Line, at Athens.

The objection to the admission made by defendants' superintendent on presentation of the plaintiff's claim for lost baggage (fol. 16), that "he had a good claim," was improperly overruled. The statement constituted no part of the *res gestæ*, but related to a past transaction, and was inadmissible as evidence against his principal (*Baptist Ch. v. Brooklyn Fire Ins. Co.*, 28 *N. Y.*, 153; *Mallory v. Perkins*, 9 *Bosw.*, 572; *Green v. Hudson River R. R. Co.*, 32 *Barb.*, 25; *Luby v. Hudson River R. R. Co.*, 17 *N. Y.*, 131; *Vail v. Judson*, 4 *E. D. Smith*, 165).

The judgment should be reversed and a new trial ordered, with costs to abide the event.

* Compare, however, *Perkins v. Portland, &c. R. R. Co.* (47 *Me.*, 573; *Noyes v. Rutland, &c. R. R. Co.*, 27 *Vt.*, 110).

DIGEST
OF
ALL POINTS OF PRACTICE
EMBRACED IN
THE STANDARD NEW YORK REPORTS,

Issued during the period covered by this volume :

Viz: 12 ABBOTT'S PR. N. S. ; 61 BARBOUR ; 3 DALY ; 42 HOWARD'S PR. ; 4 LANSING ; 46 and 47 NEW YORK ; and in the LAWS OF 1872.

ABATEMENT AND REVIVAL.

1. It is not necessary that executors of a plaintiff dying after judgment, should be formally substituted as parties, before the court can entertain a motion to set aside a judgment as void. *Supreme Ct. Sp. T.*, 1871, *Blodget v. Blodget*, 42 *How. Pr.*, 19.
2. A defendant interposed a *counter-claim* of a nature which survived, and the action abated by the death of the defendant.—*Held*, that the defendant's representatives might revive the action against the wishes of the plaintiff. *Supreme Ct. Sp. T.*, 1871, *Livermore v. Bainbridge*, 42 *How. Pr.*, 53; affirmed in 61 *Barb.*

RECEIVER.

ACCOUNT.

COMPLAINT; DISCHARGE.

ACCOUNTING.

1. In taking or stating the final accounts of a copartnership, it is to be ascertained: 1. How the firm stands as to non-partners (including coadventurers). 2. What each partner is entitled to charge in account with his copartners, each being entitled, as against the other, to everything he has advanced or brought in as a partnership transaction, and also what the other has not brought
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in, or has taken out more than he ought; and then, 3. To apportion between them the profits to be divided or losses to be made good, and ascertain what, if anything, any partner should pay to the other, in order that all cross-claims may be settled. *N. Y. Com. Pl.*, 1871, *Neudecker v. Kohlberg*, 3 *Daly*, 407.

2. An accounting between copartners is to be governed by the special provisions of the copartnership agreement, and the right to a return of capital invested by each partner is only to be destroyed by express stipulation to the contrary. Unless waived by express agreement, the return of capital or of other means furnished by each party for use and employment in the business for their mutual advantage, although a debt of a secondary character, is, as between them, an obligation of the partnership, which should be discharged before any final *division* of the profits. *Ib.*

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS; SURROGATES' COURTS.

ACKNOWLEDGMENT OF DEEDS.

- A judge of the New York common pleas has power to take acknowledgments, and do other such acts as a justice of the peace may do within the city. Opinion of Ch. J. DALY, 3 *Daly*, 457, *App.*

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1. An action does not lie by a third person against an agent, on the ground that he has in his hands money of his principal, received by him for disbursement in the general business of his agency, nor even if the money is paid to the agent to be applied to the payment of the particular demand of plaintiff. [2 *N. Y. (2 Comst.)*, 126; 5 *Den.*, 639, and cases cited.] *Ct. of App.*, 1871, *Hall v. Lauderdale*, 46 *N. Y.*, 70; distinguishing *Ross v. Curtis*, 30 *Barb.*, 238.
2. Where three towns united in building a bridge, and the highway commissioners of two of the three towns paid the indebtedness of the third,—*Held*, that unless they paid it from joint funds, they ought to sue separately for the portions paid by them respectively; but in a joint action by the two, to recover the whole amount paid for the third, as the complaint did not show a separate payment by each,—*Held*, that on demurrer for misjoinder of plaintiffs, the presumption is in favor of a payment from joint funds, and the objection of misjoinder must be taken by answer. *Supreme Ct.*, 1871, *Corey v. Rice*, 4 *Lans.*, 141.
3. Where the agent of a Children's Aid Society, being deceived by the false representations of a boy, eighteen years of age, who gave a

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false name and pretended that he was an orphan, &c.,—sent the boy to a home in the West,—*Held*, that an action by the boy's parent, to compel his return, and for damages, could not be sustained. The fact that the defendant had neglected to make inquiries as to truth of the boy's story, was not material in such an action, as the inquiries would have been fruitless. *City Ct. of Brooklyn Sp. T.*, 1872, *Nash v. Douglass*, *Ante*, 187.

4. The enticement to travel and find new homes, which is held out by a Children's Aid Society, being necessary to the conduct of the society, and sanctioned by the statute incorporating it, is not an unlawful enticement or solicitation. *Ib.*
5. A person who was employed to sell lottery tickets, after having sold a quantity of tickets, refused to pay over the money,—*Held*, that as the lottery was illegal, every contract made in furtherance thereof was void, and that no action would lie to recover back the money. *N.Y. Superior Ct. Sp. T.*, 1872, *Negley v. Devlin*, *Ante*, 210.
6. Under sanction of the legislature, a railroad bridge was built over a stream within city limits; and, on the destruction of the bridge by fire, the city proceeded to erect another bridge on substantially the same site, but built it so that it might be used not only for a railroad bridge, but also for the accommodation of foot passengers and teams. Plaintiffs, who owned a foundry on the stream, and relied mainly on the stream for power to propel their machinery, sought to enjoin the construction of the bridge until compensation was awarded them for the loss to them, produced by building the piers for the bridge in the channel of the stream.—*Held*, that no action would lie, as the plaintiffs' land was not touched, and the damage to them, if there were any at all, would be merely indirect or consequential. *Supreme Ct. Sp. T.*, 1872, *Swett v. City of Troy*, *Ante*, 100.
7. Although no action can be maintained against a municipal corporation for damages resulting from an act done by it in its sovereign or judicial character, yet where the act,—*e. g.*, the construction of of a sewer,—is performed so negligently that the plaintiff is injured by reason of such negligence, he may recover his damages. *N. Y. Com. Pl.*, 1869, *Donohue v. Mayor. &c.*, 3 *Daly*, 65.
8. Where the property of stockholders is charged by the statute, but only to an amount equal to the stock of each, upon prescribed conditions and specific process, the remedy of the creditor must be sought according to the terms and by the means provided by the charter. [7 *Hill*, 575; 3 *Id.*, 38; 39 *N. Y.*, 196.] *Ct. of App.*, 1871, *Lowry v. Inman*, 46 *N. Y.*, 119; affirming 2 *Sweeney*, 117. Reported at special term in 6 *Abb. Pr. N. S.*, 394; *S. C.*, 37 *How. Pr.*, 153.

AFFIDAVIT.

9. If the charter makes the private property of stockholders liable, and points out no mode in which this liability may be made available, and the courts of other States may give effect to the provision, the course of proceeding must be regulated by the law of the State where the remedy is sought to be enforced. [18 Maine, 35.] Absolute liability of a stockholder for corporate obligations may be enforced as other personal obligations are enforced, according to the course of procedure in the place where the person sought to be charged is found. [1 N. Y. (1 Comst.), 47; 2 Wall., 10; 20 Wend., 616.] *Id.*
10. An action may be regarded as an action for money had and received, though an allegation of fraud, not proved, be contained in the complaint. *City Ct. of Brooklyn*, 1872, *Barker v. Clark*, *Ante*, 106.

APPEAL; ATTACHMENT; CHATTELS; CLOUD ON TITLE; CONTEMPT; CORPORATION; COSTS; DEMAND; EJECTMENT; INJUNCTION; JURISDICTION; LANDLORD AND TENANT; MASTER AND SERVANT; MISTAKE; NEGLIGENCE; NEW TRIAL; PARTIES; PLEADING; RAILROAD COMPANIES; SHERIFF; TOWNS; TRESPASS.

ACTION "ON CONTRACT."

ANSWER; ARREST; ATTACHMENT; SUMMONS.

ACCORD AND SATISFACTION.

1. The mere acceptance by a creditor, from his debtor, of a less sum than the amount of the debt, without any additional consideration, benefit or advantage to the creditor, is not an accord and satisfaction, even though the acceptance was in full of the debt. *N. Y. Com. Pl.*, 1869, *Blum v. Hartman*, 3 *Daly*, 47.
2. Satisfaction by a stranger can not be pleaded in bar of defendant's own obligation. *Id.*

ADVERSE POSSESSION.

PARTITION.

AFFIDAVIT.

ARREST; CLAIM AND DELIVERY; EVIDENCE; MANDAMUS; MARINE COURT; MOTIONS AND ORDERS; SERVICE (AND PROOF OF); STIPULATION.

AMENDMENT.

AFFIDAVIT OF MERITS.

PLACE OF TRIAL.

AFFINITY.

JUDGE.

AID SOCIETY.

ACTION, 3.

ALIENS.

Certain titles not to be impeached for alienage. *Laws of 1872*, chs. 141, 358.

ALIMONY.

1. The court, on the coming in of the report of a referee as to the amount of alimony in an action for divorce, may order a larger sum to be allowed than is reported by the referee. [25 N. Y., 501.] *Supreme Ct.*, 1871, *Galinger v. Galinger*, 4 *Lans.*, 473.
2. But the amount may be modified on appeal, by the general term. *Ib.*
3. Upon the reference of a question as to the proper allowance for alimony to be paid by defendant, evidence of an offer on behalf of an unnamed person, with tender of a contract, in blank, agreeing to purchase defendant's real property at a price, and upon terms, at which defendant had said he would sell,—*Held*, not sufficient to show the value of the property to be equal to the amount offered, in opposition to competent evidence to the contrary. *Ib.*
4. Payment of costs and alimony, awarded in a final judgment dissolving the marriage contract in a wife's suit for divorce, cannot be enforced in proceedings as for a contempt, but may be enforced by execution. *Supreme Ct.*, 1871, *Lansing v. Lansing*, 4 *Lans.*, 377; reversing 41 *How. Pr.*, 248.
5. An order directing payment of arrears of alimony.—*Held*, erroneous. Payment should be enforced in the ordinary way. [55 *Barb.*, 269.] *Supreme Ct.*, 1871, *Galinger v. Galinger*, 4 *Lans.*, 473.

DIVORCE.

ALLOWANCE.

DISCONTINUANCE.

AMENDMENT.

1. In an action to rescind a compromise, if the complaint alleges mis-

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take of facts, and demands the rescission for that reason, and the proof shows also the defendant's fraud, an amendment conforming the pleading to the facts proved, is allowable at the trial, under the Code (§ 173), no surprise being shown. *Supreme Ct.*, 1871, *Smith v. Mackin*, 4 *Lans.*, 41.

2. Although a party does not come to ask relief from the report of a referee and the judgment, on the ground of "mistake, inadvertence or excusable neglect," but claiming relief as a legal right, still, under section 174 of the Code, the court may grant such relief, if the papers show that counsel upon the trial was laboring under a mistake as to the practice, and that he has acted in good faith. *Supreme Ct.*, 1871, *Bouton v. Bouton*, 42 *How. Pr.*, 11; modifying 40 *Id.*, 217.
3. Leave to amend the proceedings on the trial may be refused, in the discretion of the court; and should never be granted where it would raise a new issue which would operate as a surprise upon a party. *N. Y. Superior Ct.*, 1872, *Johnson v. Oppenheim*, *Ante*, 449.

APPEAL; COSTS; CONSTITUTIONAL LAW; HIGHWAYS; SURROGATE'S COURTS.

ANSWER

1. An answer alleging that plaintiff agreed to act as defendant's agent in the purchase of bonds, and to account for all money coming to his hands, but that after receiving a specified sum he would not account, &c., but appropriated the same to his own use, whereby he became indebted, &c., and demanding judgment in the sum specified, may be regarded as a cause of action on contract, and constitutes a proper counter-claim in an action on contract. *Supreme Ct.*, 1872, *Coit v. Stewart*, *Ante*, 216.
2. Where the defense sets up that the contract sued on is usurious according to the laws of a foreign State, the answer must show that the contract was governed by the law of such foreign State. *Supreme Ct. Sp. T.*, 18—, *Mayer v. Louis*, *Ante*, 5.
3. In an action by a consignor against his consignee, for the conversion of certain goods consigned for sale, the defendant's answer averred that the goods had been levied on as the property of a third person, to whose attaching creditor, or to the sheriff, under the attachment, they had paid the proceeds of the goods.—*Held*, that the answer was frivolous. A bailee cannot, in general, dispute his bailor's title; and in this case, the property was not taken by due process of law so as to exonerate the bailee. *N. Y. Com. Pl.*, 1869, *Barnard v. Kobbe*, 3 *Daly*, 35.

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4. The plaintiff, while sick and in expectation of death, delivered to the defendant, her attorney, a negotiable bond, to be held by him in trust for the use of her son. The plaintiff having recovered, notified the defendant that she revoked the trust, and demanded the return of the security. In an action brought by the plaintiff for damages for the conversion of the bond, the defendant interposed an answer: 1. That he held the bond and its proceeds upon and under the trust created by the plaintiff; and, 2. That he had a lien upon the same for services as plaintiff's attorney.—*Held*, that it being shown, on a motion to strike out the answer as sham, that the defendant had sold the bond, and that the plaintiff had notified him that she revoked the trust, the answer was sham and irrelevant, and should be stricken out. The defendant should show, at least, that he had sold the bond for the purpose of reinvesting the proceeds, before receipt of the notice of revocation. *N. Y. Com. Pl.*, 1870, *Henry v. Fowler*, 3 *Daly*, 199.
6. Evidence of payment, or of application of the fund in suit, to plaintiff's benefit, cannot be introduced under a general denial. *N. Y. Superior Ct.*, 1871, *Wehle v. Butler*, *Ante*, 139.

AMENDMENT, 1; EVIDENCE; PLEADING.

APPEAL.

1. Appeals to the court of appeals under section 11 of the Code, are confined to *actual determinations* of the court at general term. A judgment entered in pursuance of a remittitur is not an actual determination. The remittitur is controlling both upon the special and general terms of the court below, and its duty and power are simply to enforce the judgment of the appellate court. *Ct. of App.*, 1871, *Wilkins v. Earle*, 46 *N. Y.*, 358; *S. C.*, 42 *How. Pr.*, 257.
2. Where judgment is suspended after verdict at circuit, pending a motion for new trial, and the motion is heard and denied at general term, a judgment entered in consequence of such denial is a judgment of the general term, and from it an appeal lies to the court of appeals. It makes no difference that the order denying a new trial did not expressly direct entry of judgment nor that the judgment did not recite the denial of the motion. [Overruling 38 *N. Y.*, 619; *Id.*, 316; 40 *N. Y.*, 341; 41 *Id.*, 520.] *Ct. of App.*, 1873, *Caughey v. Smith*, 47 *N. Y.*, 244.
3. Where an inferior court has rendered judgment without having jurisdiction, the appellate court having power to review its decisions, may so far act upon the judgment as to reverse it for want of jurisdiction. *Ct. of App.*, 1871, *McMahon v. Raubs*, 47 *N. Y.*, 97; reversing 3 *Daly*, -116.

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4. No appeal lies to the court of appeals from an order of the general term of the supreme court, made upon appeal from an order in an action in the county court. This is not an action commenced in the supreme court nor brought there from another court. *Ct. of App.*, 1871, *Younghanse v. Fingar*, 47 *N. Y.*, 99.
5. An action removed from one of the district courts in New York city, to the common pleas, under *Laws of 1857*, ch. 344, is an action commenced in a justices' court; and an appeal to the court of appeals does not lie therein, from the general term of the common pleas, without leave, as prescribed by section 11, subdivision 3, of the Code. *Ct. of App.*, 1872, *Heinwick v. Korn*,* 47 *N. Y.*, 658.
6. That after a court has acquired jurisdiction of an action or proceeding, its judgment therein, if erroneous, even because rendered illegally, should not be set aside on motion, but the party aggrieved must resort to his remedy by appeal,—see *Schættler v. Gardiner*, 47 *N. Y.*, 404.
7. A judgment of affirmance taken by default is not an actual determination; and therefore, by section 352 of the Code, such a judgment by default taken at the general term of the New York marine court, cannot be reviewed on appeal by the general term of the New York common pleas. *Ct. of App.*, 1871, *McMahon v. Rauhr*, 47 *N. Y.*, 67; reversing 3 *Daly*, 116.
8. A traverse of forcible entry and detainer is not an action, and a general term order granting a new trial therein, is not appealable to the court of appeals. *Ct. of App.*, 1872, *People ex rel. Robinson v. McManus*,* 47 *N. Y.*, 661.
9. An order made at general term reversing a judgment at special term, without granting a new trial, cannot be appealed from as an order. Judgment of reversal must be perfected and that appealed from. *Ct. of App.*, 1871, *Mehl v. Vonderwulbeke*, 46 *N. Y.*, 539; reported below in 2 *Lans.*, 267.
10. In a case tried before a jury, the order of the general term, granting a new trial upon questions of fact, is not appealable. *Ct. of App.*, 1871, *Wright v. Hunter*, 46 *N. Y.*, 409.
11. An order setting aside (on any ground) the verdict of a jury on questions of fact ordered to be tried in an equity action, and ordering a new trial, is an order made in the discretion of the court [2 *N. Y.*, 563; 2 *Paige*, 482; 25 *N. Y.*, 501], and not appealable to the court of appeals. Under section 25 of the Code the mode of trial of issues of fact in equitable actions, is discretionary with the court. *Ct. of App.*, 1871, *Colie v. Tift*, 47 *N. Y.*, 119.
12. An appeal does not lie to the court of appeals, from an order

* No opinion reported.

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- setting aside the assessment of a sheriff's jury, and granting a new assessment. *Ct. of App.*, 1872, *Samuels v. Bryant*,* 47 *N. Y.*, 674.
13. An order denying a motion to vacate a judgment as irregular,—*e. g.*, a personal judgment entered in a mechanic's lien case after the lien has failed by the lapse of the year,—is not appealable to the court of appeals. [Citing 41 *N. Y.*, 358.] *Ct. of App.*, 1872, *Schaettler v. Gardiner*, 47 *N. Y.*, 404.
14. An appeal from an order granting a new trial, to the court of appeals, with a stipulation for judgment absolute against the appellant in case the order is affirmed, is only proper and advisable when the sole question that cannot be presented upon the record, relates to and will determine the merits of the controversy. *Ct. of App.*, 1871, *Cobb v. Hatfield*, 46 *N. Y.*, 533.
15. It is not advisable to appeals to the court of a appeal from an order granting a new trial, and to stipulate, as provided by section 11, subdivision 2, of the Code, except where there are presented for decision no questions except such as if decided adversely would be conclusive against the case of the party appealing. *Ct. of App.*, 1872, *Dickson v. Broadway & Seventh Ave. R. R. Co.*, 47 *N. Y.*, 507.
16. An appeal lies to the general term of the supreme court from an order made at special term, confirming a report of commissioners of estimate and assessment for opening avenues or public places in the city of New York. [Overruling 2 *Abb. Pr.*, 368.] *Supreme Ct.*, 1871, *Matter of Commissioners of Central Park*, 61 *Barb.*, 40.
17. An order for a stay of proceedings, being discretionary, is not appealable, especially when the motion is granted upon terms. The terms never can be reviewed. *Supreme Ct.*, 1872, *Schmidt v. Levy*, 61 *Barb.*, 496.
18. An order under section 317 of the Code, requiring plaintiff to give security for costs, is discretionary, and not reviewable in the court of appeals. *Ct. of App.*, 1872, *Gedney v. Purdy*,* 47 *N. Y.*, 676.
19. An order sustaining or overruling a demurrer is not appealable to the court of appeals. *Ct. of App.*, 1872, *People ex rel. Kilborne v. Benedict*,* 47 *N. Y.*, 667.
20. Where after the obtaining of a judgment by two partners plaintiffs, and an appeal therefrom by defendant, one of the partners dies, and by an order the personal representative of the deceased partner is substituted in his stead, such order is not "an intermediate order involving the merits and necessarily affecting the judgment," within section 11, subdivision 1 of the Code, and cannot be

* No opinion delivered.

APPEAL.

- reviewed on appeal to the court of appeals from the judgment. *Ct. of App.*, 1872, *Hackett v. Belden*, 47 *N. Y.*, 624.
21. An order dissolving or continuing a temporary injunction does not necessarily affect a substantial right, nor dispose of the merits of an action, but it does involve a question of discretion, and is not appealable to the court of appeals. *Ct. of App.*, 1872, *Paul v. Munger*, 47 *N. Y.*, 469.
22. The principles affecting the appealability of orders, explained. *Ib.*
23. An order directing a resettlement of a case is not appealable to the court of appeals. *Ct. of App.*, 1872, *Leffler v. Field*, 47 *N. Y.*, 407.
24. It is discretionary with a referee to allow an amendment of an answer on the trial, so as to make a denial therein contained sufficient; and it is discretionary with the court at general term, on appeal from an order refusing to set aside such amendment, to grant affirmative relief by allowing a new amended answer to be served. And, therefore, these decisions are not appealable to the court of appeals. *Ct. of App.*, 1871, *Bennett v. Lake*, 47 *N. Y.*, 93.
25. An order opening a default taken upon the trial, and allowing a trial, is discretionary, does not affect a substantial right, and is not, in the absence of abuse of discretion, reviewable on appeal. [29 *N. Y.*, 418; 16 *Wend.*, 369; 1 *N. Y.* (1 *Comst.*), 48; 17 *Abb. Pr.*, 319, note; 2 *Keyes*, 387; 1 *Daly*, 274.] *Supreme Ct.*, 1871, *Ramsey v. Gould*, 4 *Lans.*, 476.
26. An order denying a motion for judgment, on the ground that a demurrer is frivolous, is not appealable. *Ct. of App.*, 1872, *Dabney v. Greeley*, *Ante*, 191.
27. From an order made before final judgment in an action, and adjudging defendant in contempt, an appeal lies through the general term to the court of appeals. Although the cases on this question are not harmonious, the case of *Sudlow v. Knox* (7 *Abb. Pr. N. S.*, 411), is sound, and has been followed, and settles the rule that such an order, if a final order, is to be regarded as made in a special proceeding, and as affecting a substantial right. *Ct. of App.*, 1871, *Brinkley v. Brinkley*, 47 *N. Y.*, 40.
28. If such order is conditional, not imposing punishment absolutely, but only in case the defendant should refuse to comply with the previous order of the court, so that in order to inflict punishment there must be proof put on file of his failure to comply, the order is not appealable in respect to this part of it, unless there is something to show that there has been an absolute and final order imposing the threatened penalty. *Ib.*

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29. If the order, however, contains a provision that all proceedings shall be stayed in the mean time, it is in so far absolute and final, and this provision may be reviewed on appeal. *Ib.*
30. The remedy for a referee's refusal to find on questions of law and of fact, in the manner requested by a party, is not by appeal from his refusal, but by motion; and if an appeal is taken, the court can only send the case back for resettlement, or order a new trial. *Supreme Ct.*, 1872, *Leffler v. Field*, 42 *How. Pr.*, 420.
31. Where the successful party treats the case as one in which a notice of the entry of judgment is necessary, in order to limit his adversary's time to appeal, and accordingly gives him such notice, a notice of appeal seasonably served after such notice is enough, and the party cannot object that the notice of appeal should have been served within twenty days after judgment. *N. Y. Com. Pl. Sp. T.*, 1872, *Elias v. Babcock*, *Ante*, 288.
32. An appeal to the court at general term, from an order overruling a demurrer, does not, without an express stay, prevent the respondent from entering judgment pending the appeal, and on the expiration of the time allowed to answer. *Supreme Ct. Sp. T.*, 1872, *Hoyt v. Terwilliger*, *Ante*, 129.
33. Appeal to the general term may be dismissed by motion at special term. *Ct. of App.*, 1872, *Spotts v. Dumesnil*, *Ante*, 117.
34. The entry of judgment including that part favorable to the party, without an appeal by him therefrom, is an affirmative act on his part indicating his purpose to take and assert the benefit given by the judgment, and the appellate court will not disturb that part of the judgment. *Ct. of App.*, 1871, *N. Y. & Harlem R. R. Co. v. Kip*, 46 *N. Y.*, 546; affirming 11 *Abb. Pr. N. S.*, 90.
35. An appearance by the appellant at general term, and resisting the reversal of the order of the special term sustaining his demurrer to the answer of the respondent, is not a waiver of the appellant's appeal from the order of the special term setting aside plaintiff's judgment. Sustaining the demurrer is a proceeding having no connection with or dependence upon the order setting aside the judgment. *Ct. of App.*, 1871, *Pistor v. Brundutt*, 42 *How. Pr.*, 5; *S. C.*, as *Pistor v. Hatfield*, 46 *N. Y.*, 249.
36. A justice of the supreme court sitting at general term, who at special term made the order appealed from, is incompetent to sit upon a review of the order upon its merits, or to take part in determining whether the order was appealable to the general term. *Ib.*
37. Where the court overrule exceptions to the report of a referee, to whom it was referred to state an account, &c., and render judgment

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- accordingly, upon appeal from the judgment the court will not review such order, unless there are exceptions to conclusions of law. *Supreme Ct.*, 1871, *Russell v. Duffon*, 4 *Lans.*, 399.
38. If the findings of a referee are ambiguous, that construction will be adopted which will sustain the judgment, rather than that which will lead to a reversal. The rule is, that the findings are to receive the most favorable construction of which they are capable, for the purpose of upholding the judgment. *Ct. of App.*, 1871, *Hill v. Grant*, 46 *N. Y.*, 496.
39. On appeal to the general term, a judgment may be reversed for error appearing on the record; but the court of appeals, under section 11 of the Code, can only review actual determinations of the general term. Where, therefore, a judgment entered upon an order of the general term does not conform to that order, the proper remedy is by motion to the court below to correct the judgment, and not by appeal to the court of appeals in the first instance. *Ct. of App.*, 1872, *Hackett v. Belden*, 47 *N. Y.*, 624.
40. The rule that where a cause has been tried and judgment rendered on the report of a referee, and an order of reversal by the general term does not show that the reversal was based in whole or in part upon error of fact, this court, on appeal, will assume that it was based upon errors of law only,—reiterated. *Ct. of App.*, 1872, *Scofield v. Hernandez*, 47 *N. Y.*, 313; *Cayuga Bank v. Daniels*, *Id.*, 631.
41. On appeal to the court of appeals, an erroneous conclusion of the referee must be made to appear by an examination of the facts found or admitted; and resort cannot be had to the evidence to establish error in the conclusions of law. *Ct. of App.*, 1872, *Baker v. Spencer*, 47 *N. Y.*, 562; affirming 58 *Barb.*, 248.
42. The court of appeals cannot review a decision of an inferior court granting a new trial, unless it appear by the record that the trial was granted on questions of law and not of fact. If this be doubtful or uncertain by the record, the court will not decide the case, but will dismiss the appeal. [46 *N. Y.*, 409; *Id.*, 564.] *Dickson v. Broadway & Seventh Ave. R. R. Co.*, 47 *N. Y.*, 507.
43. Questions as to the amount of damages, not reviewable in the court of appeals; but only the question whether any, or more than nominal damages are recoverable. *Ct. of App.*, 1872, *Ihl v. Forty-Second Street, &c., R. R. Co.*, 47 *N. Y.*, 817.
44. Objection that the cause of action, in a suit of an equitable nature, is in reality a trespass not recognizable in equity;—*Held*, not available, when interposed for the first time on an appeal. *N. Y. Com. Pl.*, 1871, *Reed v. Gannon*, 3 *Daly*, 414.

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45. It is within the discretion of a judge at the trial, to permit a witness to be recalled in order to explain, qualify or contradict his former statement, and his decision will not be revised by a court of review. [9 C. B., 650; 5 N. Y. [1 Seld.], 67.] *Ct. of App.*, 1871, *Williams v. Sargeant*, 46 N. Y., 481.
46. Upon an appeal to the general term from an order confirming the report of a referee, giving the entire surplus moneys to the executor of the lessors, the court set aside the report and referred the case back, and in the order directed, that the share of the lessee should be ascertained, by computing the value of the residue of his term in the surplus, deducting therefrom the amount of the payments to be made by him under the lease. Upon the second hearing, evidence was received under objection on the part of the executors, as to the annual rental value of the premises. The executors, relying upon the decision of the general term, offered no evidence thereon. *Held*, that the executors had a right to repose upon their objections, as the case then stood, and the matter should be referred back, to give them an opportunity of adducing evidence upon the question of the value of the term. *Ct. of App.*, 1871, *Clarkson v. Skidmore*, 46 N. Y., 297; modifying 2 *Lans.*, 238.
47. Where the general term has the power to consider the merits of an order, it is the duty of that court so to do, and on appeal to the court of appeals, the presumption is that this duty has been performed, unless the contrary appears. The fact that an opinion rendered on making the original order at special term showed that the motion was denied for supposed want of power to entertain it, does not suffice to show that a mere affirmance at general term was made without considering the merits. *Ct. of App.*, 1871, *Tracey v. Altmyer*, 46 N. Y., 598.
48. Where exceptions were found to have been well taken and the court would have been justified in rendering an absolute judgment, —*Held*, that as the appellant's counsel had mistaken the practice by relying on a published decision, the court would dismiss the appeal instead of giving judgment absolute. *Ct. of App.*, 1871, *Sands v. Crooke*, 46 N. Y., 564.
49. Section 1. Upon the decision hereafter by the superintendent or superintendents of the poor of any county in this State, of any dispute that shall arise or has arisen, concerning the settlement of any poor person, either or any of the parties interested in such decision may appeal therefrom to the county court of the county in which such decision shall be made. *Laws of 1872*, ch. 38.
- § 2. Such appeal shall be made by the service, by the party appealing, upon the other parties interested in such decision, within thirty days after notice of the same, of a notice of appeal, which

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shall be signed by the appellant, and which shall specify the grounds of appeal. *Id.*, § 2.

§ 3. The hearing of such appeal may be brought on by either party in or out of term, upon notice of fourteen days. *Id.*, § 3.

§ 4. Upon such appeal a new trial of such matters in dispute shall be had before the county court, and its decision thereon shall be final and conclusive, and the same costs shall be awarded upon such appeal as are now allowed on appeals from courts of justices of the peace to the county courts. *Id.*, § 4.

50. Sections 268 and 272 of the Code,—which provide that a judgment shall not be deemed to have been reversed on questions of fact, unless so stated in the order of reversal,—apply to cases tried by the court or a referee, and not to cases tried by jury. And if it appears from the return that in a case tried by jury, the order at general term granting a new trial was or may have been made upon questions of facts, the order is not appealable to this court. [46 N. Y., 409.] *Ct. of App.*, 1871, *Sands v. Crooke*, 46 N. Y., 564.
51. The rule that a finding on conflicting testimony cannot be reviewed on appeal,—applied in case of an alleged breach of warranty. *Payne v. Tracey*, 42 *How. Pr.*, 95.
52. The burden is upon the appellant to show that the granting of a new trial by the general term is erroneous in matter of law. Where the return shows that questions of fact were legitimately before the general term and the evidence was such that the court may have reversed the judgment upon the facts, an appeal to this court will be dismissed. *Ct. of App.*, 1871, *Wright v. Hunter*, 46 N. Y., 409.
53. When the defeated party has endeavored in the regular way to obtain proper findings, the presumption, that all material facts of which there was evidence have been found against him, will not apply in respect to the matters as to which he unsuccessfully sought to obtain specific findings, but those matters will be regarded in the same manner as facts, which upon trial, the court has refused to submit to the jury. *Ct. of App.*, 1871, *Van Slyke v. Hyatt*, 46 N. Y., 259.
54. An appellate court cannot reverse judgment as to the part specified by the notice of appeal, without a reversal of the other part, if the provisions of the judgment are connected and dependent. *Ct. of App.*, 1871, *Murphy v. Spaulding*, 46 N. Y., 556.
55. If the defect in the cause of action is incapable of amendment,—*e. g.*, where, in an action on a bond, it appears by the complaint that the bond was taken by a judicial officer in a proceeding of which he had no jurisdiction, and was, therefore, wholly void,—the supreme court at general term has power to reverse a judgment given upon the bond, for the error appearing on the record, even without any exception taken at the trial. *Ct. of App.*, 1871, *Brookman v. Hamill*, 46 N. Y., 636.

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56. Although the Code has not changed the rule that a decision will not be reviewed for error on a point not raised or considered below, yet it has changed the rule that objection to the insufficiency of plaintiff's pleading can only be taken by demurrer, or motion in arrest; and consequently, where the defendant moves at the trial for a nonsuit, a refusal may be reversed on appeal, if the pleadings and evidence did not sustain the action, and if it does not appear from the case that the grounds of objection were not taken. *N. Y. Com. Pl.*, 1869, *Abernethy v. Church of The Puritans*, 8 *Daly*, 1.
57. A request to find that, under the evidence and the law applicable, defendant is entitled to a report in his favor, without specifying any facts to be found or any rules of law to be adjudged, is unavailing, if the general conclusions of law adverse to defendant are warranted by the facts, and they in turn supported by the evidence, and not controverted by defendant. *Ct. of App.*, 1871, *Redmond v. Liverpool, N. Y., &c. Steamboat Co.*, 46 *N. Y.*, 578; reversing 56 *Barb.*, 320.
58. If a charge as a whole convey to the jury the correct rule of law on a given question, the judgment will not be reversed on appeal, although detached sentences may be erroneous; and if the language employed is capable of different constructions, that one will be adopted which will lead to an affirmance of the judgment, unless it fairly appears that the jury were, or at least might have been, misled. *Ct. of App.*, 1872, *Caldwell v. New Jersey Steamboat Co.*, 47 *N. Y.*, 282; affirming 56 *Barb.*, 425.
59. Where the judge charged that the defendants were liable even if the jury should find the facts precisely as defendants' witnesses testified, and thereupon directed a verdict for plaintiffs, to which defendants excepted,—*Held*, that defendants might, on appeal, raise the question of the correctness of the charge and direction, although they had not requested the court to submit any question of fact [*Distinguishing* 18 *N. Y.*, 558.] *Ct. of App.*, 1871, *Low v. Hall*, 47 *N. Y.*, 104.
60. Upon an appeal from an order made at special term, the court at general term have power to grant affirmative relief to the respondent. Thus, on appeal from an order allowing an amendment of the answer at the trial, the general term may, on affirming the order, allow defendant to serve a new amended answer, and give plaintiff time to demur or reply. *Ct. of App.*, 1871, *Bennett v. Lake*, 47 *N. Y.*, 93.
61. Where a judgment for a debt and interest,—*e. g.*, for several penalties,—is reversed as to part of the debt, it must be deemed reversed as to the interest on such part. *Supreme Ct.*, 1872, *Mann v. N. Y. Central R. R. Co.*, *Ante*, 380.

ARREST.

62. The supreme court have power to construe a decision of the court of appeals in accordance with this principle, and to direct the execution to be enforced accordingly. *Ib.*

ATTORNEY AND CLIENT; CASE; CONTEMPT; COURT OF APPEALS;
COURT OF COMMON PLEAS; DEFAULT; MUNICIPAL COR-
PORATIONS; PLEADING; SURROGATES' COURTS.

APPEARANCE.

1. In an action against husband and wife, affecting the husband's real property only, in which her only interest is an inchoate right of dower, he is authorized and required to have an appearance entered for his wife, upon service of summons on him alone, and without authority from her, and she is bound thereby. [1 Paige, 421; 2 Johns. Ch., 139; 11 How. Pr., 42; 53 Barb., 183.] *Supreme Ct.*, 1871, *Lathrop v. Heacock*, 4 *Lans.*, 2.
2. It would be otherwise of an action which concerned the wife's separate estate. *Ib.*

APPEAL; PARTIES.

ARBITRATION.

In an action between commissioners of highways of adjoining towns, to recover a proportion of the expense paid by plaintiffs' town for building a bridge between their towns,—*Held*, that an award upon a submission by the commissioners of the several towns to arbitration, made before the expenses in suit were incurred, which purported to fix permanently the proportion of future liability of the respective towns in respect to construction, &c. of the bridge, was not valid, because the proportion is fixed by law. *Supreme Ct.*, 1871, *Corey v. Rice*, 4 *Lans.*, 141.

ARREST.

1. A creditor's action against the assignee for the benefit of creditors of the plaintiff's debtor, brought in behalf of the plaintiff and other creditors, who may come in and contribute, &c., for the purpose of having an accounting and distribution of the funds chargeable to the assignee, is not within subdivision 2 of section 179 of the Code, "an action for money received," in "a fiduciary capacity," in which the defendant may be arrested. Such an action contemplates more than a mere recovery of money received by the assignee, to wit, a judicial determination of the net amount, not merely of money received, but of money which ought to have been received by the assignee from the assets, and with which he is

ARREST.

- chargeable, &c. *Supreme Ct.*, 1871, *Roberts v. Prosser*, 4 *Lans.*, 369.
2. *It seems*, that the words "in an action for money received," mean an action primarily and simply for the recovery of money; and do not go beyond cases where the person who has received the money in a fiduciary capacity may be sued for money had and received. *Ib.*
 3. An order of arrest will not be granted upon an affidavit made and entitled in an action different from that before the court. *N. Y. Com. Pl. Sp. T.*, 1870, *Mason v. Lambert*, 3 *Daly*, 250.
 4. It is well settled that where fraudulent representations are alleged as the basis of an arrest, it must appear, not only that the representations were false, but that they were known to be so by the party making them, at the time they were made. *N. Y. Com. Pl.*, 1870, *Thorpe v. Waddingham*, 3 *Daly*, 275.
 5. When fraud is relied upon as subjecting a party to arrest, the particular facts constituting the fraud should be set forth. Thus where the plaintiff's affidavit on an application for an order of arrest, merely averred that the representations made by the defendant were false and fraudulent, leaving the facts a matter of mere conjecture,—*Held*, that the affidavit was defective in stating simply a conclusion, which might or might not be correct, and was not sufficient to warrant an order of arrest. *Ib.*
 6. Where a debtor, shortly before the maturity of his indebtedness, sold his property for less than its value, to a relative, to be paid for conditionally, and afterward refused to exhibit his books of account,—*Held*, that these facts were evidence of a disposal of his property with intent to defraud his creditors. *N. Y. Superior Ct. Sp. T.*, 1872, *Kern v. Rachow*, *Ante*, 352.
 7. The representations claimed to be fraudulent were made by one partner without the knowledge of the other. But the defendants were partners at the time of the making of such representations, and the representations were professedly made on behalf of the firm, and the indorsement which was procured by their means, was made on the obligation of the firm, and the firm had the benefit of it in its business. *Held*, that both were liable to arrest. Partners should be liable for the fraud as well as for the negligence of each other. *Supreme Ct. Sp. T.*, 1871, *Sherman v. Smith*, 42 *Hov. Pr.*, 198.
 8. An order of arrest cannot be sustained at all, unless it is sustainable in respect of all the causes of action stated in the complaint. *N. Y. Com. Pl. Sp. T.*, 1870, *Mason v. Lambert*, 3 *Daly*, 250.

BAIL; COMPLAINT; DISCHARGE; NE EXEAT.

 ASSIGNMENTS FOR BENEFIT OF CREDITORS.

ASSESSMENTS.

NEW YORK; TAXES.

ASSIGNEE.

COSTS.

ASSIGNMENT.

1. An assignment in writing, of a claim less than fifty dollars in amount, is not necessary, to entitle the assignee to maintain an action upon it. *N. Y. Com. Pl.*, 1871, *Murray v. Bull's Head Bank*, 3 *Daly*, 364.
2. The execution and delivery to the plaintiff, of a written order by a third party, addressed to the defendant, directing the latter to pay over to the plaintiff certain prize moneys collected for his account from the United States government by the defendant;—*Held*, sufficient to transfer the equitable title to the plaintiff so as to entitle him to maintain an action against the defendant for the money. *N. Y. Com. Pl. Sp. T.*, 1869, *Danklessen v. Braynard*, 3 *Daly*, 183.
3. No particular form of words is necessary to create an equitable assignment. Any language which indicates a clear intention to appropriate the fund, is sufficient. *Id.*
4. The fact that the money in defendant's hands was prize money collected from the government, does not invalidate the assignment, under the act of Congress (Act of February 26, 1863), in relation to assignments of certain classes of claims against the United States government. *Id.*

EVIDENCE; JUDGMENT.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

1. The general assignment for benefit of creditors' act of 1860, amended in section 4, as follows: § 4. After the lapse of one year from the date of such assignment, the county judge of the county where such inventory is filed, shall have power to issue a citation or summons compelling such assignee or assignees to appear before him, and show cause why an account of the trust funds arising under any such assignment should not be made, and in case the said county judge deem the cause, if any shown, not sufficient, he shall have power to proceed and take such accounting, and to decree the payment to any petitioning creditor or creditors their just proportionate share of such fund, or to take a final accounting thereof, and distribute and divide said fund between the claimants and persons entitled thereto.

Such citation or summons may be issued, and such accounting had, on the application of the said assignee, his surety or sureties.

ASSOCIATIONS.

or any person interested in said trust estate, which application shall be by petition, duly verified, stating the facts on which it is founded, and showing the relation the petitioners bear to or the interest they have in said trust estate, and stating, as far as the petitioners can, all other persons interested in said trust fund.

Such citation must be served and said accounting shall be had and conducted just as citations are served, and as accountings for the estates of deceased persons are had and conducted by surrogates. All laws governing surrogates on such accountings are made applicable as far as may be to proceedings under this act, and the county judge before whom any proceeding is pending shall have all powers granted surrogates therein. He may also examine the parties and all other persons as witnesses in relation to such assignment and accounting and all other matters connected therewith, and shall have the power of the county court in like cases to compel their attendance before himself or any referee whom he may, and is hereby authorized, to appoint, to take and report to him such evidence.

All orders or decrees in these proceedings shall have the same force and effect, and may be entered, docketed, enforced and appealed from the same as like orders or decrees of the county court in an original action brought therein.

2. Further provisions regulate the continuance of the proceedings on the disability, &c. of the county judge, or death of the assignee. 2 *Laws of 1872*, ch. 838.
3. Where one of the assignors of property in trust for the benefit of creditors was an infant at the time of making the assignment, such assignment is void, as it does not, when executed and delivered, operate to devote the property unqualifiedly. The general principle that an assignment by an infant is voidable only, does not apply to this branch of the law, which allows property to be withdrawn from ordinary legal process in a certain way, and upon certain terms only. It is of no consequence that the infant assignor did not revoke the assignment. The vice lies in the power he had, by law, to disaffirm and avoid. *Supreme Ct.*, 1871, *Yates v. Lyon*, 61 *Barb.*, 205.

ASSOCIATIONS.

The act of 1851 does not preclude the bringing of an action in the first instance against the members of companies or associations, such as referred to in that act. While by the act of 1853 (ch. 153), amendatory of the act of 1849 (ch. 258), it was provided that suits against joint stock companies and associations should in the first instance be brought against the president or treasurer (4 *Rev. Stat.*, Edm. ed., 650, 1), the provision in the act of 1851, as to the companies or associations there referred to, still remained, as to such suits, permissive. *N. Y. Com. Pl.* (1871 ?), *Waller v. Thomas*, 42 *How. Pr.*, 337.

PLACE OF TRIAL.

ATTACHMENT.

ATTACHMENT.

1. Though an attachment is an extraordinary remedy, which courts should watch with scrupulous jealousy, and which should only be granted upon full and satisfactory evidence that the application is well founded,—still, when a creditor fairly brings himself, by his application, within the spirit and intent of the statute authorizing this remedial and provisional remedy, he is to be protected in the enjoyment of its advantages. *Supreme Ct.*, 1870, *Rowles v. Hoare*, 61 *Barb.*, 266.
2. An action by a party to an exchange of lands, alleging fraudulent representations in respect to the lands which he was to receive, and claiming to reconvey and to recover the value which such representations attributed to the lands, is not an action on contract for the recovery of money; and an attachment cannot be issued therein. *Supreme Ct. Sp. T.*, 1871, *Crossman v. Lindsley*, 42 *How. Pr.*, 107.
3. A sale and assignment of shares of the capital stock of a corporation, attended by a delivery of the certificate, vests in the vendee the title to the stock, notwithstanding a provision contained in the certificate that the stock was transferable only upon the books of the company. Hence the service of an attachment against the assignor, by the sheriff, on the officers of the company, after such assignment, vests no equity in the sheriff, and the company cannot refuse, on the ground of such attachment, to make a transfer on its books to the vendee. And for such a refusal the company is liable to the vendee for the value of the stock. *N. Y. Com. Pl.*, 1870, *Comeau v. Guild Farm Oil Co.*, 3 *Daly*, 218.
4. An attachment against the property of a husband, and a levy thereunder upon the wife's real estate, and the filing of a notice of *lis pendens*, constitute *prima facie* no real or apparent incumbrance or hindrance to or upon the wife's title, and a court of equity will not interfere, at the wife's suit, to discharge the attachment levy and vacate the notice of *lis pendens* as a cloud upon her title. *N. Y. Com. Pl.*, 1869, *Mulligan v. Baring*, 3 *Daly*, 75.
5. Where a simultaneous levy was made under thirteen attachments, and all of the attaching creditors actively assisted in removing plaintiff's property to defendants' store, and no separation was made of plaintiff's goods under the different attachments,—*Held*, that on all the attachments being set aside, defendants, who were a portion of the attaching creditors, were liable, separately as well as jointly, for a conversion of plaintiff's property. *N. Y. Superior Ct.*, 1871, *Wehle v. Butler*, *Ante*, 139.

ATTACHMENT.

6. The provision for discharging an attachment under section 241 of the Code, as amended in 1857, that "in all cases the defendant may move to discharge the attachment, as in the case of other provisional remedies," includes all cases, as well cases of want of jurisdiction by the officer who issued it, cases of fraud in obtaining the attachment, cases of defective papers, and various others. *Suprema Ct.*, 1870, *Rowles v. Hoare*, 61 *Barb.*, 266.
7. An application to discharge or vacate an attachment may now be made, in furtherance of justice, upon the real merits of the motion, or for irregularity, or for want of jurisdiction in the officer who granted it, or for any other cause; and such motion may be made after judgment entered in the action [15 *Abb. Pr.*, 97], even though the defendant has appeared and given the undertaking required by sections 240 and 241 of the Code. [15 *Abb. Pr.*, 189.] *Id.*
8. On motion, under section 241 of the Code, to set aside an attachment, when the defendant moves upon an affidavit or affidavits made on his behalf, the plaintiff may oppose such motion, as in other cases, by affidavits which either explain or contradict those offered by the moving party. Where the motion is made on the plaintiff's original affidavits alone, no further affidavits on the part of the plaintiff are admissible. [19 *How. Pr.*, 410; 6 *Abb. Pr.*, 33.] *Id.*
9. Where the defendant, under sections 240 and 241 of the Code, moves to set aside an attachment upon the original affidavits used in obtaining it, and also upon his own and other affidavits, in order to show the improvidence of issuing it, as well as to show the injustice of issuing it, on account of the unfair statements in the plaintiff's affidavits, and asks to vacate and set it aside, to be restored to his rights by reason of the action under it, to set aside the judgment, and to be permitted to come in and defend the action upon the merits, the plaintiff has a right to read affidavits in opposition to each point in his proceedings which is assailed by the defendant in his moving papers, and as to which he asks for relief. *Id.*
10. An undertaking given to procure the discharge of property levied on under an attachment, is not invalidated because the attachment is afterwards set aside on counter-affidavits. *Supreme Ct.*, 1872, *Bildersee v. Aden*, *Ante*, 324.
11. *It seems*, that it would be otherwise if the attachment were set aside because of the insufficiency of the affidavits on which the attachment was originally obtained. *Id.*

ANSWER; CONTEMPT; DEFENSES; FALSE IMPRISONMENT; MOTIONS
AND ORDERS.

ATTORNEY AND CLIENT.

ATTORNEY AND CLIENT.

1. An attorney, by his general authority, may, after judgment rendered, give a stipulation allowing an extension of the time to perfect an appeal. *N. Y. Com. Pl. Sp. T.*, 1871, *Hoffenberth v. Muller*, *Ante*, 221.
2. The statement in the record of a judgment of another State, that the defendant there appeared by attorney, is presumptive evidence of the fact; but defendant may rebut this presumption by proof that the attorney named in the record, never had any authority to appear for him. In other words, "notwithstanding the recital of the record, he may disprove the authority of the attorney to appear." [6 *Wend.*, 447, 453; 5 *Id.*, 148; 1 *Hill*, 597; 6 *Robt.*, 198, &c.] *N. Y. Superior Ct.*, 1870, *Howard v. Smith*, 42 *How. Pr.*, 300.
3. A lawyer, who has not obtained a license, as required by the Internal Revenue act of the United States Congress, cannot recover for professional services rendered since the passage of the act, and a contract made by him to render such services is absolutely void. *N. Y. Com. Pl.*, 1869, *Hall v. Bishop*, 3 *Daly*, 109.
4. On a mutual, running, unliquidated account between attorney and client, the attorney is not entitled to interest on charges for services, not liquidated by the fee bill, nor by agreement, and the amount of which was only ascertained on conflicting evidence at the trial, and for which no time of payment was fixed. *N. Y. Com. Pl.*, 1870, *Hadley v. Ayres*, *Ante*, 340.
5. He may be allowed interest on disbursements. *Id.*
6. The act (2 *Laws of 1871*, p. 1447, ch. 668), to provide for the auditing, by canal department auditor, of payment for counsel required to be employed on behalf of the State, under *Laws of 1870*, ch. 321, § 2,—repealed. *Laws of 1872*, ch. 826.
7. An attorney has no lien upon papers of his client which come into his hands, not for the purpose of business, in the ordinary course of his professional employment; but as trustee. [1 *Maule & S.*, 535; 8 *Ves.*, 4.] *N. Y. Com. Pl.*, 1870, *Henry v. Fowler*, 3 *Daly*, 199.
8. Where a lender of money employed the borrower's attorney to search the records for incumbrances on the property proposed to be mortgaged as a security for the loan, and the attorney having reported the property unincumbered, took the mortgage for the purpose of filing the same;—*Held*, in an action by the lender against the attorney for negligence in delaying to file the mortgage until after a subsequent mortgage had been filed, that the jury were warranted in finding the relation of attorney and client to exist between the parties, notwithstanding the fact that the fee of the attorney and the expenses of filing the mortgage were paid by the

BAIL.

- borrower. *N. Y. Com. Pl.*, 1870, *Arnold v. Robertson*, 3 *Daly*, 298.
9. It appearing that the subsequent mortgage had, since its filing, been paid and its lien discharged, and also that the plaintiff, without being influenced by any knowledge or suspicion that such subsequent mortgage had ever been a prior lien, and without any agency or intervention of the defendant, had satisfied the obligation secured by the mortgage to him,—*Held*, that the plaintiff was entitled to recover only nominal damages. *Ib.*
10. It was error, in such a case, for the court to allow the jury to consider the question of defendant's fraud in inducing the plaintiff to acknowledge satisfaction of the mortgage; and a verdict founded on evidence of such fraud should not be upheld. *Ib.*
11. A settlement of a suit by the parties thereto, after verdict, but before entry of judgment, and pending a stay of proceedings, is not necessarily in derogation of the rights of the attorney of the prevailing party to such costs as have accrued at the time of the settlement; and a satisfaction of judgment entered in accordance with such settlement will not be set aside, on motion of the attorney, unless it is shown that the settlement was made collusively and in fraud of the attorney's rights. *N. Y. Com. Pl. Sp. T.*, 1872. *Wade v. Orton*, *Ante*, 444.
12. Before entry of judgment the attorney has no lien on the recovery and costs, and the parties may settle without the consent of their attorneys. *Ib.*

UNDUE INFLUENCE.

ATTORNEY-GENERAL.

The attorney-general may discontinue an action by the people. *Supreme Ct. Chambers*, 1871, *People v. Tobacco Manufac. Co.*, 42 *How. Pr.*, 162.

AUDIT.

TOWNS.

BAIL.

1. Defendant was arrested and in custody of the sheriff, at the time of entry of judgment against him, and within about a month afterwards he gave an undertaking with bail, and was thereby discharged from arrest; but was not actually charged in execution against his person, upon the judgment, until some *seven months* after the entry of judgment, and no *supersedeas* was obtained,—*Held*, that his bail were liable on the undertaking. *N. Y. Superior Ct.*, 1871, *Bostwick v. Wildey*, 42 *How. Pr.*, 245.

BILLS OF EXCEPTIONS.

2. The liability of bail, under the Code, becomes fixed twenty days after service of summons on them; and in an action upon the bail bond, it is no defense that the principal died twenty-nine days after an execution against his body was returned unsatisfied, and sixty-six days after the action against the sureties was commenced, though before service of sufficient complaint. [12 Wheat., 604; 1 Hall, 38.] *Supreme Ct.*, 1869, *Gauntley v. Wheeler*, 4 *Lans.*, 491.

BAILMENT.

DEFENSES; SUPPLEMENTARY PROCEEDINGS.

BANKRUPTCY.

1. A United States bankrupt court cannot enjoin a State court. In the execution of process, when jurisdiction is acquired, the supreme court is absolute in the control of its own orders and decrees. *Supreme Ct.*, 1871, *Tenth National Bank v. Sanger*, 42 *How. Pr.*, 179.
2. After a debtor's discharge in bankruptcy, an action will not lie to enforce a debt contracted prior to the discharge, against property held by his wife and conveyed to her by the debtor after the debt was incurred. Sections 51 and 52 of the statute of uses and trusts do not give to creditors a lien, within the meaning of the bankrupt act, but merely an equitable right, to be enforced by means of the usual equitable remedies; and as the relation of debtor and creditor is extinguished by the discharge, no action will thereafter avail, for the debt, which is its foundation, does not exist. *Ct. of App.*, 1871, *Ocean National Bank v. Olcott*, 46 *N. Y.*, 12.

COSTS, 6; DISCHARGE.

BASTARDY.

An overseer of the poor prosecuting bastardy proceedings before a justice of the peace, under the statute regulating such proceedings, is a "party" to the proceedings in such sense that the proceedings are void for affinity between him and the justice; and the justice is liable to an action for false imprisonment. *Supreme Ct.*, 1871, *Rivenburgh v. Henness*, 4 *Lans.*, 208.

BILLS, NOTES AND CHECKS.

EVIDENCE; PLEADING; PROTEST.

BILLS OF EXCEPTIONS.

EXCEPTIONS.

CASE.

BLIND ASYLUMS.

Section 3. Applications for admission into the [N. Y. State] institution shall be made to the board of trustees in such manner as they may direct, but the board shall require such application to be accompanied by a certificate from the county judge or county clerk of the county or the supervisor or town clerk of the town, or the mayor of the city where the applicant resides, setting forth that the applicant is a legal resident of the town, county and State claimed as his or her residence. *Laws of 1867, ch. 744, § 3, as amended by Laws of 1872, ch. 616.*

BONDS.

CONSTABLES; MUNICIPAL CORPORATIONS.

BOOKS.

EVIDENCE.

BROOKLYN.

Act increasing number of judges, amended. *Laws of 1872, ch. 688.*

CARRIER.

DAMAGES.

CASE.

1. Where a case on appeal does not contain any of the evidence given upon the trial before the referee, but only the facts found by him and his legal conclusions thereon, the presumption is that there was no evidence from which any other fact could be found, and exceptions to the conclusions of law in such a case, present the question whether such conclusions were warranted by the facts found. The *dictum* in *Chubbuck v. Vernam*, 42 N. Y., 432, to the effect that in such case, the cause cannot be reviewed here, is unsound; for in the absence of all the evidence it cannot appear that additional facts would have been sustained if found. *Ct. of App.*, 1871, *Stoddard v. Whiting*, 46 N. Y., 627.
2. If a referee refuses to insert in a case, matter relating to points or claims alleged to have been made upon the trial before him, the proper remedy is not to appeal from the decision of the referee on settling the case, but by motion to the court below, before argument of the appeal from the judgment, to compel the referee to insert such matters upon settlement of the case, and to send the case

CAUSE OF ACTION.

back for further findings, if necessary to a proper review of the judgment. *Ct. of App.*, 1872, *Lefler v. Field*, 47 *N. Y.*, 407.

APPEAL; COURT OF APPEALS, 7; SUBMISSION.

CAUSE OF ACTION.

1. A cause of action against executors, for services rendered their testator upon an ordinary retainer by him, in an action brought against him, is improperly united with a cause of action upon a special agreement with the executors, for continuance of the services in the same action to which they have been substituted, as defendants, for the testator after his decease. *Supreme Ct.*, 1871, *Austin v. Monroe*, 4 *Lans.*, 67; affirmed in 47 *N. Y.*, 360. COMPARE COMPLAINT.
2. Defendant made his promissory note payable to plaintiff, which was indorsed by the latter and by T. Judgment was obtained thereon by the holder, who assigned it to N., for the benefit of T. Certain real estate of plaintiff was sold upon the execution issued on said judgment. N. purchased and took a certificate of sale for the benefit of T., but in his own name. Defendant, ignorant of the sale, and deceived by T., paid the judgment in full to T., receiving a formal satisfaction of the judgment from N. Subsequently plaintiff paid T. the amount of the bid on the sale, and received the assignment of the sheriff's certificate from N. After the discovery of the fraud practiced by T., plaintiff brought an action against him therefor, obtained judgment and collected a portion thereof. He then brought this action to recover the residue of the money paid by him.—*Held*, the payment of the judgment to T., and satisfaction thereof, operated to cancel the sale, and was, in fact, a redemption. Plaintiff was, therefore, under no legal obligation to redeem, and having paid the money to S. in ignorance of the facts, could recover it back, but had no claim against the defendants. And, even if this were not so, plaintiff had the election to affirm the sale, claim it as payment of the judgment and sue defendant, or to claim the sale as canceled by the transaction between defendant and T., and sue the latter to recover back the money paid. But he could not pursue both, as they are inconsistent. *Ct. of App.*, 1871, *Goss v. Mathers*, 46 *N. Y.*, 689; affirming 2 *Lans.*, 283.
3. *It seems*, that where injuries are occasioned by defendants while acting under legislative authority, such as running railroads, grading streets, &c., negligence on the part of the defendants must be shown; but where defendants were a corporation manufacturing paper, and one of their boilers exploded, injuring the plaintiff in his real property situated adjacent to defendants' paper mill, it is not necessary to prove negligence on the part of defendants.

CERTIORARI.

The danger consequent on using their machinery was not the plaintiff's hazard, but their own. *Supreme Ct.*, 1871, *Losee v. Buchanan*, 61 *Barb.*, 86.

4. In order to sustain an action against a railroad company for the loss of plaintiff's baggage, upon a steamboat forming part of a connecting line, the plaintiff must show some community of interest in or some control over the carriage of passengers by such boat line. *N. Y. Com. Pl.*, 1872, *Green v. N. Y. Central, &c., R. R. Co.*, *Ante*, 473.
5. Proof that the railroad company checked the baggage to the terminus of the boat line, although there be evidence that they did so for their own convenience, without proof that the passenger paid them his fare for passage by the boat, is not sufficient. *Ib.*
6. If an account is composed of principal and interest, and payments are made upon account merely, the part remaining unpaid upon the whole account will be regarded as principal, and an action will lie to recover it. [5 *Cow.*, 331.] But where a principal sum is paid and received in full, no action can be maintained to recover interest, for in such cases the interest, being a mere incident, cannot exist without the debt, and the debt being extinguished the interest must necessarily be extinguished also. [11 *Paige*, 142.] *Supreme Ct.*, 1871, *Southern Central R. R. Co. v. Town of Moravia*, 61 *Barb.* 180.
7. To rescind a contract on the ground of fraud a party must disaffirm it at the earliest practicable moment after discovery of the cheat, must return all that has been received under it, and restore the other party to the condition in which he stood before the contract. *Ct. of App.*, 1871, *Cobb v. Hatfield*, 46 *N. Y.*, 533.
8. When there exists an election between inconsistent remedies, the party is confined to the remedy which he first prefers and adopts. As where a party whose half interest in a vessel is sold against his will, retains possession of the vessel after the sale, he cannot sue for a conversion. [18 *N. Y.*, 522.] *Ct. of App.*, 1871, *Rodermund v. Clark*, 46 *N. Y.*, 354.

COMPLAINT; CONTRACTS; CLOUD ON TITLE; CREDITOR'S ACTION;
HUSBAND AND WIFE; MISTAKE.

CERTIORARI.

A *certiorari*, obtained at the instance of a citizen and tax-payer, removing the proceedings respecting the settlement of an action, into the supreme court, even if, while pending, it amounts to a stay of plaintiff's proceedings thereon, could not, after it had been quashed, be invoked to annul a compromise made by the plaintiffs

CLOUD ON TITLE.

in disregard of it. *Supreme Ct.*, 1871, Board of Supervisors of Orleans County v. Bowen, 4 *Lans.*, 24.

CHATTEL MORTGAGES.

1. The delivery of a watch to his creditor by a debtor, agreeing "to give up all claim to the watch, &c., if all claims due to you (the creditor) by me (the debtor) are not paid by Aug. 1, 1867,"—*Held*, not a pledge, but a mortgage; and the title passed absolutely on the failure of the condition expressed in the instrument. *N. Y. Com. Pl. Sp. T.*, 1870, Bunacleugh v. Poolman, 3 *Daly*, 236.
2. The debtor has, however, a right of redemption in equity, which is not waived by the condition expressed in the agreement; and in proceedings supplementary to execution against him, a receiver may be appointed, so as to reach his interest in the property by a suit to redeem. *Id.*

CHATTELS.

1. One tenant in common, or joint-owner, cannot maintain an action for the possession of personal property against his co-tenant. If one tenant sells or converts the property, the co-tenant or joint-owner may, at his option, have his action for damages for the conversion, or hold his title with the purchaser. [13 *N. Y.* (3 *Kern.*), 173; 2 *Mass.*, 509; 3 *Barb.*, 451; 12 *Wend.*, 30.] *Ct. of App.*, 1871, Davis v. Lottich, 46 *N. Y.*, 393.
2. This rule applied to the case of an executory contract of sale,—followed by an absolute conveyance of a share, to an assignee of the contract. *Id.*

CLAIM AND DELIVERY.

In an action for the recovery of personal property, under the Code of Procedure, if a claim is interposed on behalf of a third person, by his agent, who swears he is duly authorized to make the claim and required affidavit, the sheriff is entitled to indemnity. *N. Y. Com. Pl. Sp. T.*, 1869, Bishop v. Baxter, 3 *Daly*, 176.

CLERK.

COUNTY CLERK; JUDGMENT.

CLOUD ON TITLE.

A court of equity will not interfere in a case where an act *en pais* is complained of as a cloud on title, where the act does not itself,

COMPLAINT.

and without concurring facts and circumstances, proved *aliunde*, establish any interest in, or title to, the premises. [34 N. Y., 480.] *N. Y. Com. Pl.*, 1869, *Mulligan v. Baring*, 3 *Daly*, 75.

INJUNCTION.

COMMISSION OF APPEALS.

Act to perfect amendment to the constitution, relative to. *Laws of* 1872, ch. 757.

COMMISSIONERS.

RAILROAD COMPANIES.

COMMITMENT.

1. Upon a conviction and sentence to six months' imprisonment, and the payment of a fine, a warrant of commitment addressed to the "keeper" of the penitentiary, requiring the prisoner to be held six months *and until payment* of the fine, or discharge in due course of law, is proper, and is a protection to the "superintendent" of the penitentiary. *Supreme Ct.*, 1872, *People v. Rawson*, 61 *Barb.*, 619.
2. A delay of twenty-one days, after conviction, and before issuing the warrant, occasioned by an attempted appeal, the cause, however, not being removed, does not affect the validity of the warrant. [5 *Wend.*, 110.] *Id.*
3. A seal is not necessary on the warrant. [2 *Rev. Stat.*, 716, § 31.] *Id.*

COMPLAINT.

1. A complaint against executors seeking to recover back an over credit given by the plaintiff to their testator in his life time, part of the amount having been paid to him, and part to his executors after his death, states but a single cause of action. *Supreme Ct.*, 1872, *Tradesmen's National Bank v. McFeely*, 61 *Barb.*, 522. But compare *Ferrin v. Myrick*, 41 *N. Y.*, 315. Compare also CAUSE OF ACTION, 1.
2. In a complaint, in an action by a broker to recover a deficiency arising on his sale of gold bought for defendant, on "a margin," it was alleged that plaintiff gave defendant "due notice in writing," that unless he deposited a further margin of five thousand dollars before 12 o'clock noon of the following day, the plaintiff would sell the gold without delay at the market rate, and hold him responsible for the difference, and that the defendant having failed to make good the margin of five thousand dollars within the time specified, the defendant, "*pursuant to said notice*," caused the

COMPLAINT.

- gold to be sold at the Gold Board, in the city of New York, on the afternoon of the following day, at the best price attainable. *Held*, that this was sufficient in substance as an averment of notice. It will be inferred from the averments of "due notice" of intention to sell, and of the sale "pursuant to the notice," that the sale would be, and actually was made, at the time specified in the notice, at the Gold Board. If not sufficiently specific, the defendant's remedy was a motion to have it made more definite and certain, before answer. *N. Y. Com. Pl.*, 1869, *Schepeler v. Eisner*, 3 *Daly*, 11.
3. Where a complaint states items of account amounting to five hundred and forty-one dollars and ninety cents, and admits a payment of three hundred and sixty-six dollars and fifteen cents, the defendant has a right to the benefit of such admission, although he attacks the correctness of the items of account. *Ct. of App.*, 1871, *White v. Smith*, 46 *N. Y.*, 418; reversing 1 *Lana.*, 469.
 4. In an action against the members of a city club, for rent on a lease made to three of the members for the use of the club, the complaint stated that the members of the club entered and occupied the premises, and thereby became assignees of the lease, &c., —*Held*, sufficient on demurrer. *N. Y. Com. Pl.*, (1871?) *Waller v. Thomas*, 43 *How. Pr.*, 337.
 5. The material averment to constitute an action for false imprisonment, on an arrest without lawful process, is, that the defendant "unlawfully seized and arrested the plaintiff." An averment of malice and want of probable cause may be treated as surplusage, or as matter merely in aggravation of damages. *N. Y. Com. Pl.*, 1869, *Ackroyd v. Ackroyd*, 3 *Daly*, 38.
 6. In an action for damages for fraud and conspiracy, the complaint need not set out in detail the various facts and circumstances relied on to establish the complicity of the defendants. It is sufficient to aver the combination, its object, and its accomplishment to the injury of the plaintiff. *N. Y. Com. Pl.*, 1869, *Ynguanzo v. Salomon*, 3 *Daly*, 153.
 7. In an action to recover the possession of personal property wrongfully detained, the complaint must allege a general or special ownership in the plaintiff. *Ct. of App.*, 1872, *Schofield v. Whitelegge*, *Ante*, 320; affirming 10 *Ante*, 104.
 8. Where, in an action to set aside a mortgage as being a cloud on title, it appears by computation from the facts stated on the face of the complaint, that there is a certain sum due on the mortgage, and the complaint alleges in words that the whole sum due is less than such amount, and alleges a tender of such smaller sum; there is no cause of action alleged, as the allegation of the sum due is a

CONFLICT OF LAWS.

mere allegation of a legal conclusion unwarranted by the premises. *N. Y. Com. Pl. Sp. T.*, 1872, *Allen v. Malcolm*, *Ante*, 335.

9. Under section 172 of the Code of Procedure, a plaintiff is authorized to amend his complaint of course, by setting forth a new cause of action. *Ct. of App.*, 1872, *Brown v. Leigh*, *Ante*, 193.
10. This right is not restricted to setting forth a cause of action of the same class as that contained in the original complaint; but he may, by omitting the original cause of action, insert another of a different class, provided the summons be appropriate to it. *Id.*
11. The same principles should be applied to the amendment of answers. *Id.*

AMENDMENT; DISMISSAL OF COMPLAINT; DISTRICT COURTS OF NEW YORK; INJUNCTION; PLEADING.

COMPENSATION.

One whose property is not actually and physically touched or taken, is not entitled to compensation for indirect or consequential injuries arising from the lawful and proper erection of a public work. *Supreme Ct. Sp. T.*, 1872, *Swett v. City of Troy*, *Ante*, 100. Compare *Duke of Buccleuch v. Metrop. Board of Works*, *Law Rep.*, 5 *H. of L.*, 418.

COMPROMISE.

In the case of a compromise of an action, the court will never inquire whether the claim relinquished was in reality just or unjust. It is enough that it was disputed, and relinquished in order to effect a settlement and end litigation. [4 *Den.*, 189; 3 *Hill*, 504; 18 *N. Y.*, 489.] *Supreme Ct.*, 1871, *Board of Supervisors of Orleans Co. v. Bowen*, 4 *Lans.*, 24.

EVIDENCE; MISTAKE; STIPULATION; SUPERVISORS.

CONFLICT OF LAWS.

1. In an action by an executor to obtain construction of a will, the court will not adjudicate upon the validity of a devise of land situated in another State. For since title to real estate can only be acquired or lost according to the law of the place where it is situate, the question whether a trust as to realty is void, as in conflict with the laws of another State, can only be determined by the courts of that State. *Ct. of App.*, 1872, *Knox v. Jones*, 47 *N. Y.*, 389.
2. The validity of a bequest of personalty depends on the law of

CONSTITUTIONAL LAW.

this State, if the testator was domiciled here at the time of his death. *Id.*

DIVORCE.

CONSTABLES.

Constables' bond to be with at least with two sureties, and in addition to former condition the obligors "shall also jointly and severally agree and become liable to pay each and every such person for any damages which he may sustain from or by any act or thing done by said constable, by virtue of his office of constable. Every constable so chosen or appointed shall, in good faith, be an actual resident of the town or ward in which he shall be chosen or appointed." 2 *Laws of 1872*, ch. 788, amending 1 *Rev. Stat.*, 346, § 21, cited as § 43.

EXECUTION; GAME; SUMMARY PROCEEDINGS.

CONSTITUTIONAL LAW.

1. The constitutional amendment of 1870 relaxed the restriction formerly imposed on the legislature in respect to extending the jurisdiction of courts of special sessions [13 *N. Y.* (8 *Kern.*), 378]; and the act conferring on such a court in Monroe county, jurisdiction of all cases of petit larceny not charged as a second offense [*Laws of 1870*, ch. 47,] is valid. *Supreme Ct.*, 1872, *People v. Rawson*, 61 *Barb.*, 619.
2. The acts of 1813 and 1818, allowing delay in the compensation for lands taken in the city of New York for local improvements, are constitutional under a liberal construction. The owner has the right to waive any constitutional objection and accept occupation of the premises as a just compensation for taking his property. *Ct. of App.*, 1871, *Detmold v. Drake*, 46 *N. Y.*, 318.
3. The provisions of chapter 459, *Laws of 1862*, as amended by chapter 814, *Laws of 1867*, authorizing the seizure of animals trespassing on private premises, are constitutional. The procedure is the same as in the case of trespasses on highways, as to which the act was held valid, in 35 *N. Y.*, 302. *Ct. of App.*, 1871, *Cook v. Gregg*, 46 *N. Y.*, 439.
4. The act does not impose a penalty for the trespass, but simply prescribes the remedy therefor; and remedies are clearly within the province of legislation. The temporary seizure and detention of property, as authorized by the statute, awaiting judicial action, is not violative of the constitution of the State of New York (Art. 1, § 6), declaring that no person shall be deprived of life, liberty, or property, without due process of law. *Id.*
5. An act disqualifying all incumbents of certain public offices from be-

COUNTINUANCE.

ing chosen to fill other designated offices, is not unconstitutional. *Supreme Ct. Sp. T.*, 1872, *People ex rel. Furman v. Clute, Ante*, 399.

COMPENSATION.

CONTEMPT.

1. Proceedings as for a contempt to enforce a civil remedy against a party and his attorney in an action, are proceedings in the action. *N. Y. Com. Pl.*, 1870, *Leland v. Smith*, 3 *Daly*, 309.
2. It is no answer to a motion to punish a party as for a contempt for disobedience of an order, that an appeal has been taken from the order and an undertaking filed. *Ib.*
3. Under the statute (2 *Rev. Stat.*, 534), proceedings cannot be had as for contempt, for the non-payment of any sum of money ordered by the court to be paid, where the payment can, by law, be enforced by execution. [2 *Rev. Stat.*, 534, § 1, subd. 3, 1 ed.] *Supreme Ct.*, 1871, *Lansing v. Lansing*, 4 *Lans.*, 377; reversing 41 *How. Pr.*, 248.
4. An attachment for contempt is primary process, and may be granted in the first instance, but not without filing such proof as, if untrue, would subject the party asserting, to prosecution for perjury. Hence an attachment issued upon the mere report of a referee, without proof *by affidavit* of the facts charged, is irregular. *N. Y. Com. Pl.*, 1869, *Ackroyd v. Ackroyd*, 3 *Daly*, 38.
5. Although the court have power, on disobedience of an order, to punish the party for his contempt by fine or imprisonment or by refusing *favor*, in proceedings, by applying the rule that one in contempt will not be heard, it cannot refuse to hear him on matters of strict right. The true rule is that a party in contempt will not be permitted, until he is purged of it, to ask the favor of the court, or take any aggressive proceedings against his adversary. But it is his right to take measures to protect himself, and to make any motion designed to show that the order adjudging him in contempt was erroneous. It is error for the court to stay him from proceeding, by appeal, to have the order which he disregarded reversed. [Citing cases.] *Ct. of App.*, 1871, *Brinkley v. Brinkley*, 47 *N. Y.*, 40.

COUNTINUANCE.

It seems, that if section 121 of the Code provided no method for procuring the continuance of an action, it would be only an omission in the Code as to a point of practice, and where the petitioners have the right to have the action continued, the court, in the exercise of its general powers over such matters, would supply and regulate such omission. *Supreme Ct.*, 1872, *Livermore v. Bainbridge*, 61 *Barb.*, 358.

CORPORATIONS.

CONTRACTS.

1. The taking, by a party, of any benefit under a contract, with knowledge of the fraud which led to making the contract, is an affirmation of the contract, and precludes the party from rescinding on the ground of such fraud. [1 Den., 69; 2 Hill, 288; 5 Id., 389.] *Ct. of App.*, 1871, *Cobb v. Hatfield*, 46 N. Y., 533.
2. In an action for work, labor and materials, done and furnished, the defense was that the articles furnished were not to be paid for until the defendant should receive payment therefor from those to whom he sold; that the articles were to be made in a skillful and substantial manner, but that they were imperfect, and that the vendees of the defendant had refused to pay for them, and had claimed damages against defendant.—*Held*,
 1. That evidence was not admissible on the part of defendant, to show that the vendees claimed damages.
 2. It was proper to charge the jury that if they found that the agreement was that the defendant might sell on a reasonable term of credit, the plaintiff could recover if that term had expired, although the defendant had not been paid by his vendee. *Ct. of App.*, 1871, *Seltenreich v. Hiemenz*, 46 N. Y., 677.

COMPROMISE; EVIDENCE; INSURANCE.

CONSTITUTION.

TRESPASS.

CONVERSION (EQUITABLE).

WILL.

CONVICTION

COMMITMENT; INDICTMENT; WITNESS.

CORPORATIONS.

1. The consent and approbation of a justice of the supreme court required by the act, the general benevolent corporations act, is but one of the conditions precedent to the right to file the certificate of organization, and is not conclusive either upon the public or the secretary of State. *Ct. of App.*, 1871, *People ex rel. Blossom v. Nelson*, 46 N. Y., 477; reversing 11 *Abb. Pr. N. S.*, 106; and affirming 10 *Id.*, 200; S. C., 3 *Lans.*, 394; 60 *Barb.*, 159.
2. Where a charter is granted subject to a power reserved by the legislature to amend or repeal it, a subsequent act authorizing the com-

COSTS.

- pany to reduce the capital, on consent of a certain majority of the stockholders, is not unconstitutional, either as impairing the obligation of a contract, or as altering the character or purpose of the corporation. *N. Y. Com. Pl. Sp. T.*, 1872, *Joslyn v. Pacific Mail Steamship Co.*, *Ante*, 329.
3. A stockholder cannot maintain an action against a corporation to effect a forfeiture of its charter for a year's disuse of its powers, until after judgment of forfeiture in a suit at the instance of the attorney-general. *Supreme Ct.*, 1871, *Gilman v. Green Point Sugar Co.*, 4 *Lans.*, 482.
 4. In an action brought by a stockholder of a corporation to set aside an invalid lease made by the corporation, the court will not adjust the equities between the lessor and lessee, if they are not embraced in the pleadings containing the issues to be tried. *Supreme Ct.*, 1871, *Copeland v. Citizen's Gas Light Co.*, 61 *Barb.*, 60.
 5. On an application under 1 *Rev. Stat.*, 603, § 5,—giving the supreme court power to review elections in private corporations,—notice to the persons who claim to have been elected, and to the corporation, is sufficient. It is not necessary that all the stockholders have notice of the application. *Supreme Ct. Sp. T.*, 1872, *Schoharie Valley R. R. Case*, *Ante*, 394.
 6. Where the directors of a corporation are deprived of possession of the stock book of the company, it is proper for them to open a new one, making it a copy as far as possible of the old. In such a case the inspectors of an election may properly refer to the new stock book to ascertain who are voters; but, if the old book be produced, the record therein must govern in reference to the transfers recorded there before the new book was opened. *Ib.*

INJUNCTION; JURY; PENALTY; RECEIVER.

COSTS.

1. The power of a court or of any officer thereof to tax for costs, disbursements, or charges at law or in equity, is confined to business done in court in the progress of a cause, except where the statute otherwise provides. *N. Y. Com. Pl.*, 1870, *Lynch v. Meyers*, 3 *Daly*, 256.
2. A court of equity has no inherent jurisdiction to award costs independent of a statutory authority. Hence, in a suit between copartners for a settlement of the copartnership affairs, the court will not, before final judgment, appropriate any part of the partnership funds in the hands of the receiver as a compensation or allowance to plaintiff's attorney for his services in the action. *N. Y. Com. Pl. Sp. T.*, 1870, *Struthers v. Christal*, 3 *Daly*, 327.

COSTS.

3. Where both parties appealed, and plaintiff abandoned his appeal, and defendant failed in his appeal,—*Held*, that neither party should have costs against the other. *Supreme Ct.*, 1870, *Leftwich v. Clinton*, 4 *Lans.*, 176.
4. A plaintiff recovering less than fifty dollars is not entitled to costs, but is chargeable with them, notwithstanding the facts that his complaint demanded judgment for more than two hundred dollars (the limit of a justice's jurisdiction); and notwithstanding the pleadings raised an issue of title, if that issue was found in defendant's favor. *Supreme Ct. Sp. T.*, 1871, *Alexander v. Hard*, 42 *How. Pr.*, 131.
5. Under the present organization of the court of appeals, no formal assignment of terms having been made, and a new calendar being made annually, there can be but one term fee for each calendar year. *N. Y. Superior Ct. Sp. T.*, 1872, *Palmer v. De Witt*, 42 *How. Pr.*, 466.
6. An assignee in bankruptcy who prosecutes unsuccessfully an action which had been brought by the bankrupt in a court of this State, and which was pending when the cause of action was transferred to the assignee, is liable personally for costs, under section 321 of the Code of Procedure. *N. Y. Superior Ct. Sp. T.*, 1872, *Reade v. Waterhouse*, *Ante*, 255.
7. *It seems*, that where, in a foreclosure suit, there being several defendants, those only have answered against whom a personal claim is made, and they offer to allow judgment to be taken against them for a certain sum *and costs*, the plaintiff may enter judgment against them for such sum, with costs for the proceedings against all the defendants. *Supreme Ct. Sp. T.*, 1871, *Penfield v. James*, *Ante*, 247.
8. Where the general term modify the judgment rendered, and reduce the plaintiff's recovery to the amount of an offer of judgment made by the defendant before verdict, and give leave to either party to apply for a re-adjustment of costs, the plaintiff cannot proceed to enforce the judgment, until the application has been made and determined. *Ib.*
9. Where an action commenced in a justice's court is removed to the supreme court upon the same pleadings, it continues as the identical action, and in the supreme court a party is entitled to the benefit of an offer to allow judgment, made in the action in the justice's court. *Supreme Ct.*, 1871, *Niagara Falls Suspension Bridge Co. v. Bachman*, 4 *Lans.*, 523.
10. The statute allowing interest to be taxed as costs does not entitle the plaintiff to retain his judgment as to the whole interest, after the judgment has been modified on appeal by reducing the principal recovery. *Supreme Ct.*, 1872, *Mann v. N. Y. Central, &c., R. R. Co.*, 12 *Ante*, 380.

COUNTY CLERK.

11. "Section 1. Subdivision one of section one of the act entitled 'An act in relation to the fees of sheriffs, except in the counties of New York, Kings and Westchester,' " passed April twelve, eighteen hundred and seventy-one, is hereby amended so as to read as follows:

"1. For serving a summons or summons and complaint, or summons and notice of object of action, or any other paper issued in any action, the sum of one dollar, and for necessary travel in making such service the sum of six cents per mile to and from the place of service, to be computed in all cases from the court house of the county; and if there are two or more court houses, to be computed from the nearest to the place of service." *Laws of 1871*, ch. 415, § subd. 1, as amended * by *Laws of 1872*, ch. 26.

12. In an action by the sheriff to recover keeper's fees incurred upon the defendant's promise to pay the expenses of a keeper,—*Held*, that no such expenses should be recovered, except upon competent proof that the same had been incurred in compliance with such promise, and that, as there was no statute authorizing a taxation of such expenses by a judge, his certificate was not evidence that they had been incurred. *N. Y. Com. Pl.*, 1870, *Lynch v. Meyers*, 3 *Daly*, 256.
13. If, after the levying of an execution under a judgment, the judgment be modified on appeal by reducing it in amount, the sheriff is only entitled to collect his fees on the amount of the judgment as modified, even though he has never released his original levy. *Buffalo Superior Ct. Sp. T.*, 1872, *Dole v. N. Y. Central R. R. Co.*, *Ante*, 385.

DISCONTINUANCE; INJUNCTION; JUSTICE'S COURT; MARINE COURT; SECURITY.

COUNTER-CLAIM.

In an action upon contract for work done, the only counter-claim by the defendant was a liquidated amount by way of damages for failure to complete the work by the stipulated time, and the referee found that part of the work was "badly done," and allowed the defendant one thousand three hundred and ninety-one dollars for it.—*Held*, that the finding could not be sustained by way either of counter-claim or recoupment, there being no claim for damages on that account set up in the answer. *N. Y. Com. Pl.*, 1871, *Shute v. Hamilton*, 3 *Daly*, 462.

DISCONTINUANCE; SET-OFF.

COUNTY CLERK.

1. County clerk of Montgomery authorized to sign certain records of his predecessor. *Laws of 1872*, ch. 317.

* Amendment took effect Feb. 8, 1872.

COURTS.

2. The clerk is authorized to cancel and discharge the docket of a judgment, upon the filing with him of an acknowledgment of satisfaction, signed by the party in whose favor the judgment is obtained, and authenticated in the manner required. Without this, his act in canceling the docket is without jurisdiction, and void as to the parties whose rights purport to be affected by it. It is incumbent on parties who propose to act on the faith of statements made in the docket, to see that the clerk had due authority to make the entries. *Supreme Ct.*, 1871, *Booth v. Farmers' and Mechanics' National Bank*, 4 *Lans.*, 301.

COUNTY COURT.

HIGHWAYS.

COUNTY JUDGE.

1. A county judge cannot make an order to show cause why an injunction should not be continued, returnable before himself. *Supreme Ct. Sp. T.*, 1872, *Town of Middletown v. Rondout & Oswego R. R. Co.*, *Ante*, 276.
2. The decision in *Parmenter v. Roth* (9 *Abb. Pr. N. S.*, 385), that a county judge cannot decide a contested motion, applies to the granting of injunction orders. *Ib.*
3. A county judge has no jurisdiction to hear and decide a contested motion for an injunction order, in a cause pending in the supreme court. *Supreme Ct. Sp. T.*, 1872, *Town of Rochester v. Davis*, *Ante*, 270.
4. There is no distinction in this respect between injunction orders and orders to stay proceedings, &c. *Ib.*

MUNICIPAL CORPORATIONS; PROHIBITION.

COURTS.

1. Act for employment of stenographer in Monroe county court, and court of sessions, amended. *Laws of 1872*, ch. 749.
2. The act of 1871, ch. 700, relating to stenographers in circuit courts, &c., extended to the third, fourth and fifth districts; and *Laws of 1867*, ch. 41, and *Laws of 1869*, ch. 672, repealed. *Laws of 1872*, ch. 139.

BANKRUPTCY; DIVORCE; EVIDENCE; INJUNCTION; JURISDICTION;
MARINE COURT; MOTIONS AND ORDERS; NEW TRIAL;
SHERIFF; RELIGIOUS CORPORATIONS; and titles of
particular courts.

COURT OF APPEALS.

1. There is no sufficient ground in any case for entertaining an appeal to the court of appeals, before judgment, from an order in respect to findings. *Ct. of App.*, 1871, *Van Slyke v. Hyatt*, 46 *N. Y.*, 259.
2. *It seems*, that judicial notice comes in the place of proof and is to be exercised by the tribunal which has the power to pass upon the facts; and the court of appeals will not take judicial notice of the existence of a fact, which has not been found by the court below, or upon which a finding has been refused. *Ct. of App.*, 1871, *Wood v. North Western Ins. Co.*, 46 *N. Y.*, 421.
3. An order of the general term affirming an order denying a new trial, asked on the ground of surprise, &c., &c., is not reviewable in the court of appeals; but where it affirmatively appears that the court at general term refused to consider the merits from an erroneous supposition that it had no power so to do, and based the order upon that ground, it will be reviewed and reversed by the appellate court. [20 *N. Y.*, 81.] *Ct. of App.*, 1871, *Tracey v. Altmyer*, 46 *N. Y.*, 598.
4. Since the Code, the court of appeals has no more power to review a question of fact in an equity suit, than in an action at law. *Ct. of App.*, 1871, *Haight v. Williams*, 46 *N. Y.*, 683.
5. Supposed errors of a jury in allowing excessive damages cannot be corrected in the court of appeals. *Ct. of App.*, 1871, *Williams v. Sargeant*, 46 *N. Y.*, 481.
6. In general, questions of fact determined upon a trial by a referee, or by the court without a jury, can only be reviewed in the supreme court; and the cases in which the court of appeals can look into the evidence, to determine whether questions of fact have been properly decided, are only such as are made exceptions to the general rule by statute. *Ct. of App.*, 1872, *Field v. Munson*, 47 *N. Y.*, 221.
7. It is no excuse for the non-service of copies of the case (required by rule 7), that the proper return has not been made and filed, as required by rule 2. *Ct. of App.*, 1871, *Sage v. Volkening*, 46 *N. Y.*, 148.
8. A question decided in the court of appeals after full argument and deliberation, will not be reviewed there on another appeal in the same case, unless there has been some plain mistake, as in overlooking some statutory provision or some controlling decision, such as would require the court to grant a re-argument. *Ct. of App.*, 1872, *Eaton v. Alger*, 47 *N. Y.*, 345; affirming 57 *Barb.*, 345.

APPEAL; CASE; COSTS, 5; EXCEPTIONS.

COURTS OF SESSIONS.

COURT OF COMMON PLEAS.

1. The court of common pleas is, as to all appealable questions from the marine court, the court of final resort (except when it allows an appeal to the court of appeals), and its orders are conclusive. *N. Y. Com. Pl.*, 1870, *Leland v. Smith*, 3 *Daly*, 309.
2. The court of common pleas takes jurisdiction of actions for the partition of real estate. *N. Y. Com. Pl.*, 1869, *McGlone v. Goodwin*, 3 *Daly*, 185.

COURT OF IMPEACHMENT.*

Act relating to. *Laws of 1872*, ch. 627.

COURTS OF OYER AND TERMINER.

The legislature have power to regulate the organization of courts of oyer and terminer, subject to the requirement of the constitution that a justice of the supreme court must be a member and preside. But this requirement does not imply that there must be associate judges. *Ct. of App.*, 1872, *Smith v. People*, 47 *N. Y.*, 330.

COURTS OF SESSIONS.

1. The provisions of the act of April, 1857, as to courts of special sessions, &c., amended by adding at the end of section 2, as follows: Charges for offenses against the provisions of ch. 375, of the Laws of 1867, entitled "An act for the more effectual prevention of cruelty to animals," also for offenses against the provisions of ch. 682, of the Laws of 1866, entitled "An act better to prevent cruelty to animals." *Laws of 1872*, ch. 530.
2. "Section 1. It shall and may be lawful, whenever the accumulations and the pressure of criminal business shall, in the discretion of the recorder or city judge of the city of New York demand it, that the said recorder or city judge shall, five days prior to the first Monday of any month during the year, cause an order to be entered upon the minutes of the court of general sessions of the peace in and for the city and county of New York, directing that a double session of said court be held, to commence upon the first Monday of the ensuing month; and shall also direct the drawing of an additional number of petit jurors for said court, not exceeding double the number now authorized by law; and whenever said additional number of jurors shall be so ordered to be drawn, it shall be the duty of the judges of the said court, and they are hereby empowered to hold, at the ensuing term thereof, a double session of

* The proceedings on the impeachment of Justice G. G. BARNARD in July and August, 1872, are reported in a volume issued by the State printers.

DAMAGES.

- said court for the trial of all causes triable therein." *Laws of 1872*, ch. 367. See also *People v. Davis*, 61 *Barb.*, 456.
3. Appointment of clerk, deputy clerk and other officers of the court of special sessions of the peace in and for the city and county of New York. *Laws of 1872*, ch. 373.
 4. An act relative to special sessions in Monroe county. *Law of 1872*, ch. 685. See also *People v. Rawson*, 61 *Barb.*, 619.

CONSTITUTIONAL LAW; GRAND JURY.

CREDITOR'S ACTIONS.

A creditor at large, not having exhausted his legal remedy of judgment and execution, has no status in a court of equity to invoke its aid to test the validity of a judgment suffered and a mortgage alleged to have been executed by a debtor to defraud his creditors. [32 N. Y., 457.] *N. Y. Com. Pl. Sp. T.*, 1870, *Bownes v. Weld*, 3 *Daly*, 253.

BANKRUPTCY, 2.

DAMAGES.

1. The laws of the United States not determining the value of a pound sterling for commercial purposes, resort may be had to the custom of merchants.—*Held*, therefore, in an action on a draft for fifty pounds sterling, drawn in London, and accepted by the defendant at New York, that the just rule was to give the creditor the amount in currency that he would have to pay to remit the bill; and, therefore, the plaintiff was entitled to the price of exchange between New York and London. The real par, and not the nominal par of exchange, is the measure of damages in such a case. *N. Y. Com. Pl.*, 1869, *Guteman v. Davis*, 3 *Daly*, 120.
2. The damages recoverable from a common carrier for failure to carry goods according to his contract, whereby they became lost, are the value of the goods at the place fixed for delivery, at the time they should have been delivered, in the condition the carrier undertook to deliver them, less the price to be paid for the service. *Ct. of App.*, 1871, *Sturgess v. Bissell*, 46 *N. Y.*, 462.
3. The measure of damages against a common carrier for negligently omitting to deliver goods within a reasonable time, is the difference in their value at the time and place they ought to have been delivered, and the time of their actual delivery. [Citing cases.] *Ct. of App.*, 1871, *Ward v. N. Y. Central R. R. Co.*, 47 *N. Y.*, 29; overruling *dictum* in *Wibert v. Erie R. R. Co.*, 19 *Barb.*, 36.
4. Gold coin is not merchandise, and a recovery cannot be had in case of its loss, for its value in currency, but must be for gold. The

DAMAGES.

- same rule must apply on a recovery for tort, as on contract. *Ct. of App.*, 1871, Kellogg v. Sweeney, 46 N. Y., 291.
5. In estimating the damages for a collision, interest on the value of the property lost, is properly allowed. *Ct. of App.*, 1871, Parrott v. Knickerbocker & N. Y. Ice Co., 46 N. Y., 361; reversing 2 *Sweeney*, 93.
 6. After a loan made on a pledge of bonds has been repaid, and the pledgee has promised to return the bonds, but refuses to do so on demand, an action will lie for their conversion, in which the measure of damages will be the value of the bonds when demand was made for them, and interest on such value from the time of demand. *Supreme Ct.*, 1871, Roberts v. Berdell, 61 *Barb.*, 37.
 7. In actions for breach of warranty on the sale of goods, the measure of damages is the difference between the value of the goods if they had corresponded with the warranty, and their actual value. [Muller v. Eno, 14 N. Y., 606.] *Supreme Ct.*, 1868, Wells v. Selwood, 61 *Barb.*, 238.
 8. The damages recoverable by a municipal corporation for breach of a contract with them to keep a street in repair, are not restricted to the expense of repairing, but may include the amount for which the corporation has been adjudged liable to a third person, for injuries sustained by him by reason of the non-repair, in a case where the contractor has due notice to come in and defend the suit for injuries. *Ct. of App.*, 1872, City of Brooklyn v. Brooklyn City R. R. Co., 47 N. Y., 475; affirming S. C., 8 *Abb. Pr. N. S.*, 356; S. C., less fully, 57 *Barb.*, 497.
 9. In an action to recover from one who fraudulently represented himself to be authorized to let a store, damages sustained by the hirer in reliance on his representations, plaintiff is entitled to recover such damages as are the natural and necessary consequence of the wrong done,—*e. g.*, fixtures prepared for the premises, and storage and insurance paid on the same. *N. Y. Com. Pl.*, 1869, Dung v. Parker, 3 *Daly*, 89.
 10. In an action in the nature of replevin, plaintiff obtained the property by proceedings of claim and delivery, and the defendant retook it upon the required undertaking.—*Held*, upon a recovery in the action, plaintiff was not entitled to recover for the use of the property, in addition to the actual damages for detention. *Supreme Ct.*, 1871, Twinam v. Swart, 4 *Lans.*, 263.
 11. In actions *ex delicto* it is in the discretion of the jury to allow interest or not, and it is error to charge them that the plaintiff is entitled to interest as a matter of right. [Sedgw. on Dam., 386, 5 ed., 441; 45 *Barb.*, 43; 18 N. Y., 462.] *N. Y. Com. Pl.*, 1872, Wehle v. Haviland, 42 *How. Pr.*, 399.

DEFENSES.

12. In what cases exemplary damages may be recovered from a corporation for negligence affecting human life and limb. *Caldwell v. N. J. Steamboat Co.*, 47 *N. Y.*, 282; affirming 56 *Barb.*, 425.
13. A verdict of five thousand dollars damages set aside as excessive, where the plaintiff's injury resulting from defendant's negligence was a temporary loss of sight in one eye, which did not prevent him from carrying on his usual business. *Supreme Ct.*, 1872, *Tinney v. New Jersey Steamboat Co.*, *Ante*, 1.
14. Delay caused by a mere negotiation for compromise, does not affect measure of damages on breach of executory contract of sale. *Hewitt v. Miller*, 51 *Barb.*, 567.
15. Measure of damages for failure to form corporation and buy patent, as agreed. *Kirschmann v. Lediard*, 61 *Barb.*, 573.

FALSE IMPRISONMENT; TRADEMARKS; TRESPASS.

DEED.

The general rule that a recital in a prior deed of the same lands, of facts, which should put the purchaser upon inquiry, and require him to examine other matters that would unfold the true title, is constructive notice of a defect in the title,—explained. *Ct. of App.*, 1871, *Acer v. Westcott*, 46 *N. Y.*, 384; reversing 1 *Lans.*, 193.

DEFAULT.

Where a default is taken at the trial, the usual practice to set it aside is to apply on affidavit, to the justice assigned to hear motions, for a stay, and to make a motion to be relieved, without waiting for a formal order of dismissal to be entered. And an order opening the default is discretionary, and not appealable. *Supreme Ct.* 1871, *Ramsey v. Gould*, 4 *Lans.*, 476.

FORMER ADJUDICATION.

DEFENSES.

1. Where plaintiff sued for the value of certain bonds detained by defendant, and *after* the commencement of his suit, was made a co-defendant in a suit against his opponent for the recovery of the same bonds,—*Held*, no defense to plaintiff's suit. *Ct. of App.*, 1871, *Welch v. Sage*, 47 *N. Y.*, 143.
2. In an action of ejectment, the defendants pleaded, and under objection, proved the fact of a mutual mistake between the owner, one of the defendants, and the plaintiff's grantor, by which they included in a deed, the property in question. The defendants prayed for a reformation of the deed. *Held*, that, as in this action the deed could not be reformed for want of the necessary parties,

DEMURRER.

- the defendants could not set up nor prove the mistake, as a defense. *Supreme Ct.*, 1871, *Hicks v. Sheppard*, 4 *Lans.*, 385.
3. In actions on contracts, mistake therein, and a demand for a correction, are available as an equitable defense. *Andrews v. Gillespie*, 47 *N. Y.*, 487.
 4. A bailee cannot defend against his bailor, by showing that the property was attached in his hands as that of a third person, and that he delivered or paid it to the latter or to the sheriff. [34 *N. Y.*, 463.] The due process of law which protects a bailee, is process against the bailor. [35 *Barb.*, 191; 18 *Vt.*, 186.] *N. Y. Com. Pl.*, 1869, *Barnard v. Kobbe*, 3 *Duly*, 35.
 5. In an action to set aside a mortgage as a cloud on title, a defense that in a former action between the same parties, brought for the foreclosure of the mortgage, the plaintiff had appeared and defended, and that an appeal from a judgment in that action was then pending;—*Held*, good on demurrer. *N. Y. Com. Pl. Sp. T.*, 1872, *Allen v. Malcolm*, *Ante*, 335.
 6. Where a draft is taken on account of an antecedent debt, without surrendering anything, the subsequent acceptors are not precluded from showing that their acceptance was procured by the fraud of the drawers, and was wholly without consideration. [Reviewing many cases.] *N. Y. Superior Ct.*, 1872, *Philbrick v. Dallett*, *Ante*, 419.
 7. The pendency of an attachment suit in Massachusetts, commenced by a creditor of, and against a New York insurance company, after the company has been dissolved, in which suit the claims of the company against the maker of premium notes have been garnisheed, is no defense to an action on such notes against the maker, by the receivers of such company, though such receivers appeared as claimants in the attachment suit. [18 *N. Y.*, 596; 3 *Id.*, 421; 8 *Pet.*, 286; 7 *Paige*, 299.] *Supreme Ct.*, 1871, *Osgood v. McGuire*, 61 *Barb.*, 54.

CAUSE OF ACTION; PLEADING.

DEMAND.

INSURANCE COMPANY; LIMITATIONS; TOWNS; VILLAGES.

DEMURRER.

However defective may be a defense, it is not liable to demurrer while the pleading which it assumes to answer is radically insufficient to call for any defense whatever. *N. Y. Com. Pl. Sp. T.*, 1872, *Allen v. Malcolm*, *Ante*, 335.

DISCHARGE.

DEPOSITION.

1. Under section 391 of the Code of Procedure and rule 21 of 1871, a party to an action may, in a proper case, have an order for the examination of his adversary before issue joined. *N. Y. Com. Pl. Sp. T.*, 1872, *Hadley v. Fowler*, *Ante*, 244.
2. The case of *McVickar v. Greenleaf* (1 *Abb. Pr. N. S.*, 452; *S. C.*, 7 *Robt.*, 657), approved; and *Bell v. Richmond* (4 *Abb. Pr. N. S.*, 44, *S. C.*, 50 *Barb.*, 571), overruled. *Id.*
3. A corporation is "a party" within the meaning of section 391 of the Code of Procedure, providing for the examination of a party before trial; and the president of a corporation defendant may be examined under that section of the Code. That provision of the Code was designed as a substitute for the bill of discovery under oath in aid of the prosecution or defense of another action under the old practice. *N. Y. Com. Pl.*, 1869, *Carr v. Great Western Ins. Co.*, 3 *Daly*, 160.
4. The fact that an answer to a cross-interrogatory is not sufficiently full,—*Held*, not ground for excluding the deposition, where the question was apparently answered substantially as a person of common understanding would answer it. The remedy is to obtain a re-execution of the commission. *Ct. of App.*, 1872, *Baker v. Spencer*, 47 *N. Y.*, 562; affirming 58 *Barb.*, 248.

DISCHARGE.

1. A certificate of discharge in bankruptcy issued under the bankrupt act of 1867, cannot be impeached in a State court, on the ground that it was improperly granted. The only remedy under the act, is in the court which granted the discharge. *Ct. of App.*, 1871, *Ocean National Bank v. Olcott*, 46 *N. Y.*, 12.
2. An order for discharge of a debtor from imprisonment, under *Rev. Stat.*, pt. 2, ch. 5, tit. 1, art. 6, should show that the court has general jurisdiction of the subject matter, and also that it has attained, by the proper proceedings, particular jurisdiction of the person and the especial case, in order *per se* to protect the sheriff in obeying it. [1 *Den.*, 141.] But if it does not contain recitals of facts sufficient to confer general and special jurisdiction, such facts may be proved aliunde. *Ct. of App.*, 1871, *Bullymore v. Cooper*, 46 *N. Y.*, 236; affirming in part, 2 *Lans.*, 71.
3. The statute providing for the discharge of a debtor imprisoned on execution (art. 6, tit. 1, ch. 5, p. 2, Revised Statutes), is imperative that the papers presented to the court, shall conform with exactness to its provisions. It is requisite to jurisdiction of a peti-

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tion for discharge, that an account of real and personal estate, as it existed at the time of arrest, be presented to the court with the petition. *Ib.*

4. It is also requisite that at the time of presenting such petition, an affidavit of verification, as prescribed by the statute, be indorsed upon it and sworn to by the applicant. This cannot be done afterward. *Ib.*
5. The statement that the petitioner, prior to the rendition of the judgment in execution of which he was arrested, was declared bankrupt, and an assignee of all his property appointed, does not supply the defect of an account of his property at the time of imprisonment. *Ib.*
6. A discharge under the insolvent laws of Massachusetts is not a bar to an action for the recovery of a debt, not set forth in the petition in insolvency, where the omission was through mistake, inaccuracy or ignorance, and not fraudulent. [7 Barb., 576; 12 N. Y. (2 Kern.), 575.] *Supreme Ct.*, 1871, *Hall v. Robbins*, 4 *Lans.*, 463.

DISCONTINUANCE.

1. Plaintiff may discontinue, although defendant has put in a counter-claim. *N. Y. Com. Pl. Sp. T.*, 1871, *Tubbs v. Hall*, *Ante*, 237.
2. The court may compel the plaintiff to pay to the defendant an extra allowance in addition to the taxable costs, as a condition of discontinuing. *Ib.*
3. Such extra allowance was granted, in a case where defendant had retained counsel, and served an answer joining issue with the plaintiff's cause of action, and setting up a counter-claim, and where plaintiff, after having been required to do so, had failed to file a bond for costs. *Ib.*
4. While the plaintiff in an action may generally discontinue the same as a matter of course and *ex-parte*, on the payment or tender of statutory costs, yet where the defendant has acquired some fixed right in the course of the action, which a continuance would affect, he cannot do so without the leave of the court, and upon notice. *N. Y. Com. Pl.*, 1870, *Leslie v. Leslie*, 3 *Daly*, 194. Affirmed in 10 *Abb. Pr. N. S.*, 64.
5. A plaintiff has no absolute right to discontinue an action after the interposition of a counter-claim. The question is in the discretion of the court, which will be exercised according to the circumstances of each particular case. *Supreme Ct.*, 1872, *Livermore v. Bainbridge*, 61 *Barb.*, 358.
6. Where, on the application of the plaintiff, a cross action has been

DISTRESS.

stayed, on the ground that the defendant can obtain relief in this action on the counter-claim which he has interposed, and this cause has been nearly completed,—*Held*, leave to discontinue this action must be refused. *Ib.*

7. Where the representatives of a deceased party have the right to have the action continued, they may move for an order under section 121 of the Code. *Ib.*

DISCOVERY AND INSPECTION.

1. It became the uniform practice of the first district, to refuse application to compel the production of books and papers, on the examination of a party, before trial. The statute has pointed out the only mode by which a discovery of books and papers can be obtained before trial. To do so the party applying must not only show what he wants, but must also prove that he cannot obtain the information elsewhere. *Supreme Ct.*, 1872, *Hauseman v. Sterling*, 61 *Barb.*, 347.
2. *It seems*, that an examination of the adverse party, and a discovery and inspection of his books and papers, cannot be had in one proceeding; and the provisions of section 388 of the Code relating to the latter object, cannot be invoked to sustain an order for the former object. *Supreme Ct. Sp. T.*, 1871, *Havemeyer v. Ingersoll*, *Ante*, 301.
3. Where facts and circumstances are shown which warrant a presumption that a book or document sought contains evidence which will tend to prove some facts which the party applying has to establish, the application for a discovery should be granted. *N. Y. Com. Pl. Sp. T.*, 1869, *Union Paper Collar Co. v. Metropolitan Collar Co.*, 3 *Daly*, 171.

DISMISSAL OF COMPLAINT.

A motion to dismiss the plaintiff's complaint, made under subd. 4 of § 274 of the Code, for delay in bringing the cause to trial, must be denied if the delay be shown to be *not unreasonable*; and *it seems* that if the delay be unreasonable the court is not absolutely required to dismiss the complaint. "May" in the statute is not imperative. *N. Y. Superior Ct. Sp. T.*, 1871, *Perkins v. Butler*, 42 *How. Pr.*, 102.

NONSUIT; PLEADING; TRIAL.

DISTRESS.

A mortgagee's wrongful seizure of mortgaged chattels, before default in the mortgage debt, is not "a distress" within the provis-

DIVORCE.

ions of the Revised Statutes and Code (section 123),—which declare that actions brought for property distrained for any cause, shall be laid in the county where the distress was made. Those provisions only refer to the proceeding of distress as it existed at common law, by which a party might take and hold the personal property of another as a pledge or security for the payment of debt, the discharge of some duty or reparation for an injury done, with the right in certain cases, to sell it to obtain satisfaction. *N. Y. Com. Pl.*, 1871, *Boyd v. Howden*, 3 *Daly*, 455.

DISTRICT-ATTORNEYS.

1. Appointment of assistant district-attorneys, in counties where not hitherto authorized, allowed. *Laws of 1872*, ch. 587.
2. District-attorney of any county, may, with approval of a county judge, employ counsel to assist him in important criminal case; expense to be a county charge. 2 *Laws of 1872*, p. 1753, ch. 733, § 2.

DISTRIBUTION.

A widow who presented to the appraisers a note, payable to her husband and herself, and had it appraised as part of his estate, in ignorance of her right to take it by survivorship,—*Held*, not concluded thereby. The legal presumption was that the note belonged to the widow, as survivor of the deceased, and was her property, as against the heirs and executors, and it was immaterial whether the consideration of the note was advanced by the deceased or his wife to the maker. [4 *N. Y. (4 Comst.)*, 284.] *Supreme Ct.*, 1872, *Sanford v. Sanford*, 61 *Barb.*, 293.

DISTRICT COURTS (OF NEW YORK).

1. A district court of the city of New York has jurisdiction of an action of claim and delivery of chattels, unlawfully taken and detained by the defendant in another county, if process be served upon the defendant in the county of New York. *N. Y. Com. Pl.*, 1871, *Boyd v. Howden*, 3 *Daly*, 455.
2. An oral complaint in a district court "on a counterfeit bill passed by the defendants to the plaintiff's assignor in payment of check, and assigned to the plaintiff twenty dollars,"—*Held*, sufficient. *N. Y. Com. Pl.*, 1871, *Murray v. Bull's Head Bank*, 3 *Daly*, 364.

JURISDICTION.

DIVORCE.

1. A decree of divorce, obtained in another State, without service of process upon the defendant, and while both parties at the com-

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- mencement of the suit and during its pendency resided in this State, is invalid. The record of such a decree is not conclusive upon the courts of this State, as to the question of jurisdiction; but the facts alleged therein may be shown to be untrue. [41 N. Y., 272; 2 Am. Lead. Cas., 725; 6 Wend., 447; 5 Id., 148; 6 Barb., 613.] *Ct. of App.*, 1871, *Hoffman v. Hoffman*, 46 N. Y., 30; affirming 55 Barb., 269.
2. A decree of divorce *a vinculo matrimonii* granted in Iowa, for cruel and inhuman treatment and final desertion, which causes accrued before either of the parties resided in Iowa, the defendant never having resided there, is not valid for any purpose in this State. The courts in Iowa had no jurisdiction of the cause of action, as it was not ground for divorce under the laws of this State, where it occurred. The doctrine is that every State may dissolve the marriage relation of all its domiciled inhabitants for causes occurring while such domicile continues. [See 3 Am. L. Reg. N. S., 193; 1 Johns., 424; 18 Wend., 407.] *Supreme Ct.*, 1871, *Holmes v. Holmes*, 4 Lans., 388; reversing 8 Abb. Pr. N. S., 1; 57 Barb., 305.
 3. The party obtaining an invalid decree of divorce is not estopped from calling it in question. The parties cannot, by estoppel, dissolve a marriage. *Ib.*
 4. Whether the court have power to grant temporary alimony in a case in which a marriage is denied, and not yet proven,—*query?* *Brinkley v. Brinkley*, 47 N. Y., 40.
 5. By virtue of the incidental powers formerly vested in chancery, and now devolved on the supreme court, that court, in an action brought by a husband, against his wife, to have the marriage declared void by reason of her former marriage, has power to award to her, upon final hearing and judgment, an allowance for extra expenses and counsel fees in addition to the taxable costs. [Reviewing authorities.] And if the amount awarded is not so excessive as to be beyond the scope of a legal discretion, the court of appeals will not interfere with the allowance on appeal. *Ct. of App.*, 1872, *Griffin v. Griffin*, 47 N. Y., 134.
 6. On the coming in of the report of a referee to whom it has been referred to report the proper amount to be allowed as permanent alimony, the court may allow a larger sum than that fixed by the referee. [25 N. Y., 501.] But the amount may be modified on appeal, by the general term. *Supreme Ct.*, 1871, *Galinger v. Galinger*, 4 Lans., 473. Consult, also, ALIMONY.

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EVIDENCE; JUDGMENT.

 ERROR (WRIT OF).

DOWER.

1. The release of dower which a married woman makes by joining with her husband in a conveyance of his land, operates against her only by estoppel, and can be taken advantage of only by those who claim under that conveyance. *Ct. of App.*, 1872, *Malony v. Horan*, *Ante*, 289.
2. When a deed, executed by a husband and wife, is declared void because of the husband's unsoundness of mind, the court cannot, in declaring the deed void in law, allow deductions on account of the value of the wife's dower, nor on account of taxes and assessments paid since the execution of the deed. [39 *How. Pr.*, 329.] *Supreme Ct.*, 1871, *Marvin v. Lewis*, 61 *Barb.*, 49.

FORECLOSURE.

EJECTMENT.

Ejectment, *it seems*, lies against an assignee of part of the premises, under 2 *Rev. Stat.*, 505, § 30,—although no apportionment of rent be made. *Stuyvesant v. Grisler*, *Ante*, 6.

DEFENSES, 2; FORECLOSURE, 2; MISTAKE, 4.

ELECTIONS.

1. Supervisors are disqualified as candidates for superintendent of poor, and resignation after election does not remove the disability. *People ex rel. Furman v. Clute*, *Ante*, 399.
2. Rules applicable to the counting of votes, where some are cast for an ineligible candidate. *Id.*

EQUITY.

1. Although equity will not interfere to secure to a party a legal right of no value to him, it will not restrain him from enforcing his legal right. *Ct. of App.*, 1871, *Clinton v. Myers*, 46 *N. Y.*, 511.
2. Cases in which equity interposes, at the suit of a citizen, against municipal corporation. *Phelps v. City of Watertown*, 61 *Barb.*, 121.
3. Maxim that "he who seeks equity must do equity," applied. [26 *Wend.*, 143; 3 *Cow.*, 190; 35 *N. Y.*, 533.] *Comstock v. Johnson*, 46 *N. Y.*, 615.

INJUNCTION; MARINE COURT.

ERROR (WRIT OF).

On a writ of error to review a judgment of the New York general

EVIDENCE.

sessions, even though there was no request to charge, nor exception taken to the charge, the court ought, under *Laws of 1855*, ch. 337, § 3, to reverse, if there was any error which might have prejudiced the prisoner. *Supreme Ct.*, 1872, *McNevin v. People*, 61 *Barb.*, 307.

ESTOPPEL.

An estoppel *in pais* is not made out, unless the party setting it up relied on the statements made or acts done which are claimed to make an estoppel. *Ct. of App.*, 1872, *Malony v. Horan*, *Ante*, 289.
DIVORCE; FORECLOSURE, 2; FORMER ADJUDICATION; TRIAL.

EVIDENCE.

1. When one asserts a right, based on the illegality or irregularity of the proceedings of a court or public officer, the burden of showing the alleged defects is on him. *Supreme Ct.*, 1871, *Wood v. Terry*, 4 *Lans.*, 80.
2. If property in the exclusive possession of a party for hire is injured in a way that ordinarily does not occur without negligence, the burden is on the bailee to show that the injury was not caused by his negligence. [Story on B., §§ 407, 411; 3 *Keb.*, 135; 26 *Vt.*, 340; 18 *N. Y.*, 544; *Ang. & A. on Carr.*, 266; 15 *La. An.*, 103.] *Ct. of App.*, 1871, *Collins v. Bennett*, 46 *N. Y.*, 490; 1872, *Caldwell v. N. J. Steamboat Co.*, 47 *Id.*, 282; affirming 56 *Barb.*, 425.
3. In a case of a bailment for hire, a bailor, in order to recover for a loss, must prove affirmatively that the loss was caused by the negligence of the bailee. [10 *Wall.*, 176; 6 *How. U. S.*, 344; 1 *Cow.*, 109; 9 *Wend.*, 268; 4 *Keyes*, 108.] The circumstances of the loss may show presumptive negligence, but where this is the case, it is error to charge that the burden of proof then comes on defendants to disprove negligence. *Ct. of App.*, 1871, *Lamb v. Camden & Amboy Transportation Co.*, 46 *N. Y.*, 271; reversing 2 *Daly*, 454.
4. In cases of warranty the rule is, that the acceptance of the article on delivery, and the continuing of the possession and use of it, without notice of its defects, cast the burden of proof upon the vendee, on the trial, to explain why he had not returned it or given notice of its defects. *Supreme Ct.*, 1868, *Wells v. Selwood*, 61 *Barb.*, 238.
5. Where an alteration in a contract appears to be suspicious on its face, and is not duly noted on the paper, the burden of proof is upon the party who claims that the alteration was genuine. *N. Y. Com. Pl.*, 1871, *O'Donnell v. Harmon*, 3 *Daly*, 424.
6. Presumptions in respect to gifts and advancements. *Grey v. Grey*, 47 *N. Y.*, 552; *Sanford v. Sanford*, 61 *Barb.*, 293.

EVIDENCE.

7. Hearsay admissible to prove intent to resist commission of crime. *Temple v. People*, 4 *Lans.*, 119.
8. The declarations and admissions of a party to the record, of any fact material to the issue, may be proved by the adverse party, although they are inconsistent with and tend to contradict the testimony of another witness of such adverse party. [3 *Den.*, 58; 4 *N. Y.* (4 *Comst.*), 403.] *Ct. of App.*, 1871, *Williams v. Sargeant*, 46 *N. Y.*, 481.
9. When party may prove his own declarations. *Downs v. N. Y. Central R. R. Co.*, 47 *N. Y.*, 83.
10. An admission by a railroad superintendent that a claim for lost baggage is a good one,—not competent against the company. *Green v. N. Y. Central, &c., R. R. Co.*, *Ante*, 473.
11. Declarations of husband made when not acting as his wife's agent, not admissible against her. *Warner v. Warren*, 46 *N. Y.*, 228.
12. Evidence of provocations of assault, admissible in mitigation. *Stellar v. Nellis*, 42 *How. Pr.*, 163.
13. Declarations, when competent as part of the *res gesta*, on a transfer of property. *Sanford v. Sanford*, 61 *Barb.*, 293; *Britton v. Lorenz*, 3 *Daly*, 23.
On a question of boundary. *Smith v. McNamara*, 4 *Lans.*, 169.
On a question of fraudulent combination to deceive. *Dart v. Walker*, 3 *Daly*, 136.
14. A dissolution of partnership may be proved by parol or partly by parol. A paper, executed by one partner and delivered to the others, certifying facts which, if true, would be presumptive evidence of a dissolution, may be received on the question whether such an agreement was made, as corroborative of the alleged parol contract and as part of the transaction. *Ct. of App.*, 1871, *Emerson v. Parsons*, 46 *N. Y.*, 560; affirming 2 *Sweeny*, 447.
15. Parol evidence, how far admissible to vary or explain writing. *Drew v. Swift*, 46 *N. Y.*, 204; *Milton v. Hudson River Steamboat Co.*, 4 *Lans.*, 76; *Meyer v. Hibsher*, 47 *N. Y.*, 265; *Robinson v. McManus*, 4 *Lans.*, 380; *McBurney v. Wellman*, 42 *Barb.*, 390; *Smith v. Holland*, 61 *Id.*, 333.
16. Under 1 *Rev. Stat.*, 759, § 17, a record of a conveyance duly recorded, or a transcript thereof duly certified, is made original and primary evidence, and may be introduced in evidence with the same effect as the original, and without proof of the loss or destruction of the latter.* *Ct. of App.*, 1872, *Clark v. Clark*, 47 *N. Y.*, 664.
17. The docket of a judgment, and memoranda of cancellation thereon, are no part of the record of the court, and do not import ab-

* No opinion reported.

EVIDENCE.

- solute verity. *Supreme Ct.*, 1871, *Booth v. Farmers' and Mechanics' National Bank*, 4 *Lans.*, 301.
18. The record book of a notary is the best evidence of the entries therein, and if the entries are competent for any purpose, the book should be produced, or shown to be lost, before 'parol evidence of the entries is allowable. *Supreme Ct.*, 1871, *Genet v. Lawyer*, 61 *Barb.*, 211.
 19. The entry of a deputy of a notary public in New Orleans, in the record book required by the notary to be kept, of the demand and protest of a note, and of the manner in which, and the persons upon whom, notice was served,—*Held*, competent evidence of such facts. [Laws of 1865, p. 516, ch. 309.] *Supreme Ct.*, 1872, *Fassin v. Hubbard*, 61 *Barb.*, 548.
 20. The affidavits of notice and sale in a statute foreclosure, are evidence of the title of the purchaser at such sale, although unrecorded. [Disapproving 31 *N. Y.*, 157; and following 29 *Barb.*, 297.] *Supreme Ct.*, 1869, *Frink v. Thompson*, 4 *Lans.*, 489.
 21. The regularity of proceedings of assessment and sale for unpaid taxes, is presumed, in favor of persons in possession, under the comptroller's deed, as against mere intruders. [54 *Barb.*, 9, 30; 7 *Id.*, 621.] *Supreme Ct.*, 1870, *Thompson v. Burbans*, 61 *Barb.*, 260.
 22. Minutes, &c., of a corporation, are, in general, evidence of its proceedings. *Abernethy v. Church of the Puritans*, 3 *Daly*, 1.
 23. A formal notice of dissolution signed by all the members of the firm, and published, although it stated a dissolution on the day, does not furnish conclusive evidence that the firm continued until that day. *Ct. of App.*, 1871, *Emerson v. Parsons*, 46 *N. Y.*, 560; affirming 2 *Sweeny*, 447.
 24. Newspaper account of accident not admissible, in action against railroad company, without proof that it was an original memorandum, or embodied statements made by the parties at the time. *Downs v. N. Y. Central R. R. Co.*, 47 *N. Y.*, 83.
 25. Instruments requiring a revenue stamp, though unstamped, may be stamped and used in evidence, in the absence of intent to defraud the revenue in omitting the stamp. *Supreme Ct.*, 1869, *Frink v. Thompson*, 4 *Lans.*, 489.
 26. Where the defendant under section 165 of the Code pleads the truth of his charges in justification, and also matters in mitigation, the answer of justification, though it be unsustained by proof, is not evidence of malice, and cannot be considered as aggravating the damages. [Code, § 165, 11 *N. Y.* (1 *Kern.*), 347.] *Ct. of App.*, 1871, *Klinck v. Colby*, 46 *N. Y.*, 427.
 27. The same rule applies where, under an answer proper to such end,

EVIDENCE

- defendant has shown that the communication was privileged. [7 Q. B., Ad. & E. N. S., 68.] *Ib.*
28. In an action to recover from one who fraudulently represented himself to be authorized to let a store, the damages sustained by the hirer in reliance on his representations, evidence of expenditures, induced by defendant's promise, although not specially pleaded, are admissible as a part of the *res gesta* to show that plaintiff relied and acted on defendant's promise. *N. Y. Com. Pl.*, 1869, *Dung v. Parker*, 3 *Daly*, 89.
29. In a suit against a railroad company for injuries received through defendant's negligence, evidence of negotiations for a settlement of the claim with defendant's officers for several years after the injury,—*Held*, competent to explain delay in bringing the action. *Ct. of App.*, 1871, *Downs v. N. Y. Central R. R. Co.*, 47 *N. Y.*, 83.
30. The rule that evidence that efforts have been made by an agent of one of the parties to a suit, to settle the controversy upon liberal terms,—is admissible upon the trial, applied. *Ct. of App.*, 1871, *Ross v. Banta*, 46 *N. Y.*, 210.
31. The opinion of experts is only admissible, or of any weight, when the facts or particulars upon which it is predicated have been so distinctly proven that any other expert who heard them testified to, or to whom they were communicated, would be in like manner enabled to make an estimate or give an opinion. The general statement, by a witness, of his opinion or conclusion, unless the facts and particulars upon which it was founded appear to be within his knowledge, and the process by which his conclusion is arrived at, appears, is improper testimony to be admitted on a trial [48 *N. Y.*, 279], and amounts at most to mere conjecture. *N. Y. Com. Pl.*, 1872, *Wehle v. Haviland*, 42 *How. Pr.*, 399.
32. Value of defendant's property, not proved by offer to purchase, at a price. *Galinger v. Galinger*, 4 *Lans.*, 473.
33. Rules applicable to evidence respecting negligence of railroad servant, and negligence of company in employing an incompetent or careless man. *Baulec v. N. Y. & Harlem R. R. Co.*, *Ante*, 310.
34. In an action on a statutory undertaking, a consideration need not be proved. *Supreme Ct.*, 1872, *Bildersee v. Aden*, *Ante*, 324.
35. Rules of evidence, applicable on action on memorandum check. *Turnbull v. Osborne*, *Ante*, 200.
36. What is sufficient proof that a gift enterprise was a lottery. *Negley v. Devlin*, *Ante*, 210.

DEPOSITIONS; DIVORCE; EXAMINATION OF PARTIES; EXECUTORS
AND ADMINISTRATORS, 9; FORMER ADJUDICATION; NEW
TRIAL; OFFICER; PARTIES; PLEADING; REFERENCE;
TRIAL; WILL; WITNESS.

EXECUTION.

EXAMINATION OF PARTIES.

Under Rule 21 of 1871, the court may grant an order for the examination of defendant, to enable plaintiff to prepare his complaint. *Supreme Ct. Sp. T.*, 1871, *Havemeyer v. Ingersoll*, *Ante*, 301.

DEPOSITIONS.

EXCEPTIONS.

1. Exceptions to the charge of a judge must be specific, and present the very point to be raised; and where various requests are made to the court to charge, an exception to the refusal of the court to charge each of the requests submitted, except so far as embraced in the charge which had been delivered, and an exception to every part of the charge inconsistent with such requests, present no question for review on appeal. *Ct. of App.*, 1872, *Ayrault v. Pacific Bank*, 47 *N. Y.*, 570; affirming 6 *Robt.*, 337.
2. The familiar rule, that to sustain an exception to the judge's direction to the jury to find a verdict in favor of the one party or the other, the request to submit a question to the jury must be made on the trial, and should be so distinct and specific, that the court can pass directly upon it,—applied. *N. Y. Superior Ct.*, 1871, *Schroff v. Bauer*, 42 *How. Pr.*, 348.
3. The principle that a general exception to a charge is unavailing, if there be any sound position in the charge,—is applicable to an exception to the findings of the court on a trial without a jury. [38 *N. Y.*, 263; Code, § 268.] *Ct. of App.*, 1872, *Middlebrook v. Preadbent*, 47 *N. Y.*, 443.
4. The rule that the judge cannot, on the trial, take the assessment of damages from the jury, nor suspend judgment and order the exceptions to be heard in the first instance at general term, except upon an uncontradicted state of facts,—applied. *Fey v. Smith*, 3 *Daly*, 386.
5. Judges to settle, &c., bills of exceptions in criminal cases, after expiration of office as before. On death of a judge of the sessions, surviving members may settle the bill. *Laws of 1872*, ch. 56.

APPEAL; CASE; COURT OF APPEALS; NEW TRIAL.

EXECUTION.

1. The court in which judgment is rendered still have jurisdiction to grant an order to issue execution thereon, against the personal representatives of a deceased defendant. The consent of the surrogate, under *Laws of 1850*, ch. 295, is an additional requisite, and is not substituted for that of the court. [11 *How. Pr.*, 209; 13 *Abb.*

EXECUTORS AND ADMINISTRATORS.

Pr., 80.] *Supreme Ct.*, 1872, *Marine Bank of Chicago v. Van Brunt*, 61 *Barb.*, 361.

2. The pendency of proceedings supplementary to execution, is not a valid objection to the court's granting leave to issue another execution, after five years have elapsed since entry of judgment; notice of the application being given to defendant. Supplementary proceedings under the Code are a summary and inexpensive substitute for the former creditor's bill, and the former practice applies, unless inconsistent with, or superseded by, the change made by the legislature. *N. Y. Com. Pl.*, 1870, *Smith v. Mahony*, 3 *Daly*, 285.
3. Exemption of property from execution is a personal right, and must be claimed, or will be deemed in law as waived. A constable holding process is not bound to consult with owners of property before proceeding with a levy. After notice that a levy has been made, unless the judgment debtor gives the officer notice of his claim of exemption, he cannot recover against such officer. [23 *Barb.*, 250.] *Supreme Ct.*, 1871, *Twinam v. Swart*, 4 *Lans.*, 263.
4. A person who buys a chattel in good faith at a sale on execution is not liable in an action for recovery of the property, brought on the ground that it was exempt without demand by the plaintiff, if plaintiff did not claim exemption at the sale, but forbade the sale without specifying any ground. *Ib.*
5. Where a judgment creditor, who resided at a distance, was detained by accident and without fault on his part, and did not arrive at the place of sale until some fifteen minutes after the sheriff had sold the property, upon one bid, for a nominal sum, subject to previous liens, the plaintiff not being represented by any one, and the sheriff having only waited ten minutes after the advertised time before selling,—*Held*, that the sale should be set aside on a motion of the creditor, who would otherwise lose his claim. *Supreme Ct. Sp. T.*, 1872, *Williams v. Williams*, 42 *How. Pr.*, 411.
6. The sheriff should wait a reasonable time before closing his sale, and if there are no bidders, or if the plaintiff is not represented, and any bid made is inadequate to the value of the property sold, the sheriff should postpone the sale. *Ib.*

BAIL, 2; CONTEMPT, 8.

EXECUTORS AND ADMINISTRATORS.

1. Authority of domestic administrator of non-resident is superior to that of subsequently appointed foreign administrator. *Stone v. Scripture*, 4 *Lans.*, 186.
2. A special administrator has no authority to make investments, but

- should deposit funds, on interest, but not for a fixed time. *Supreme Ct.*, 1871, *Baskin v. Baskin*, 4 *Lans.*, 90.
3. In an action by a donee *causa mortis* of a note payable to bearer, against the maker, who has paid the amount of the note to the administrator of the donor, the defendant cannot interpose the claims of creditors against the estate of the payee as a defense. Claims against the donor, presented to his administrator, but not otherwise established, do not, as against the donee, show the existence of debts. *Supreme Ct.*, 1871, *House v. Grant*, 4 *Lans.*, 296.
 4. One of several administrators may make a payment on an obligation of his intestate before the statute has run against it, and so save the obligation from the operation of the statute to that time. But *it seems*, that one of several administrators cannot by a promise, or the act of payment of a part, revive and restore a stale demand. *Supreme Ct.*, 1871, *Heath v. Grenell*, 61 *Barb.*, 190.
 5. The representatives, of a deceased sole defendant who has put in a counter-claim in an action, have such an interest in the action as to be entitled to an order to continue it. *Supreme Ct.*, 1872, *Livermore v. Bainbridge*, 61 *Barb.*, 358; S. C., 43 *How. Pr.*, 272; affirming 42 *Id.*, 53.
 6. The claim presented for payment and offered to be referred, before action brought, must be *substantially* the claim upon which the plaintiff subsequently recovers; but need not be of the precise amount recovered in the action, nor that it should be in favor of precisely the same party, so long as the executor is not misled and is apprised of the general nature of the claim. Nor need the claim be presented to each of two executors. *N. Y. Com. Pl. Sp. T.*, 1870, *Genet v. Binsse*, 3 *Daly*, 239.
 7. The words "such refusal," in the short statute of limitations (2 *Edmonds Stat.*, p. 91, § 38), mean a refusal to allow or pay the claim, not a refusal to refer; but where an agreement in writing to refer is made, upon which both parties have acted, although no referee is chosen, the claim will be regarded as referred, for the purpose of avoiding the statute of limitations. *Ct. of App.*, 1872, *Nat. Bank of Fishkill v. Speight*,* 47 *N. Y.*, 668.
 8. Distinction between presentation and allowance under 2 *Rev. Stat.*, 88, § 34, and voluntary partial payment by an administrator, from assets in his hands. *Heath v. Grenell*, 51 *Barb.*, 190.
 9. Sales by order of surrogates not to be impeached after lapse of five years, if notice was published six weeks successively before the day of sale, though not for forty-two days. Where surrogates' records have undergone removal, and twenty-five years have elapsed since

* No opinion reported.

FORECLOSURE.

the sale, due appointment of guardians for all minor devisees shall be presumed, and may be disproved only by affirmative record evidence that they were not. 1 *Laws of* 1872, ch. 92; inserting this provision in 1 *Laws of* 1869, p. 475, ch. 260, which amended the act of 1850.

CAUSE OF ACTION; COMPLAINT, 1; LIMITATIONS; SECURITY;
SURROGATES' COURTS.

FALSE IMPRISONMENT.

1. Where an attachment, issued by competent jurisdictional authority, is set aside for irregularity, the party issuing it becomes a trespasser *ab initio*; and where he appears by counsel, and resists the motion to vacate, he cannot escape liability by throwing the responsibility upon his attorney. *N. Y. Com. Pl.*, 1869, *Ackroyd v. Ackroyd*, 3 *Daly*, 38.
2. In such a case, where the damages are moderate and scarcely punitive, the recovery should be sustained, without reference to the actual damage. *Ib.*

COMPLAINT, 5.

FORECLOSURE.

1. The courts of this State will not enjoin a mortgagee of lands without the State, from selling them by public sale within the State, according to the terms of the mortgage, merely on the allegation that such power is void, if it does not appear that it is void by the law of the State or Territory where the lands are situated, or otherwise. *N. Y. Com. Pl.*, 1870, *Central Gold Mining Co. v. Platt*, 3 *Daly*, 263.
2. A landlord, holding a mortgage on the lease, dispossessed the tenant by summary proceedings for the payment of rent, and afterward foreclosed the mortgage and sold the leasehold under a decree of foreclosure,—*Held*, that he was estopped from setting up, as against the purchaser, that the lease was terminated by the dispossession. *N. Y. Superior Ct. Sp. T.*, 1868, *Stuyvesant v. Grisler*, *Ante*, 6.
3. Where a wife united with her husband in a conveyance of land upon which was a purchase-money mortgage, and the mortgage was afterwards foreclosed;—*Held*, that, as between the wife and strangers to the conveyance, she was not entitled to dower in the surplus. *Supreme Ct.*, 1871, *Elmendorf v. Lockwood*, 4 *Lans.*, 393. But compare *Malony v. Horan*, *Ante*, 289.
4. A mortgagee who, upon foreclosure of his mortgage by advertisement and sale under the statute, receives only the amount due and

FORMER ADJUDICATION.

expenses, from the purchaser of the mortgaged premises, is not liable as trustee, to lienors subsequent to his mortgage, for the surplus. Though it may be otherwise if the surplus comes to his hands. *Supreme Ct.*, 1871, *Russell v. Dufion*, 4 *Lans.*, 399.

5. The lessee, by being made a party to an action to foreclose a mortgage on the demised premises, is not bound by the sum which the premises bring in fixing the value of the fee; nor is he confined to a certain per centage thereon, as the value of the rental, upon the question of his right to surplus moneys. *Ct. of App.*, 1871, *Clarkson v. Skidmore*, 46 *N. Y.*, 297; modifying 2 *Lans.*, 238.
6. When both parties are before the court as claimants, and the contest is only between them or parties claiming under them, the fund will be disposed of in accordance with their covenants and the resulting equities. *Id.*

COSTS, 5, 7; INTEREST.

FORFEITURES.

Forfeitures are not favored in equity [4 *Johns. Ch.*, 431], and will not be inferred where the meaning is doubtful, or it requires a strained or very technical construction. *N. Y. Com. Pl.*, 1869, *Abernethy v. Church of Puritans*, 3 *Daly*, 1.

CORPORATIONS, 3; RAILROAD COMPANIES; PENALTIES

FORMER ADJUDICATION.

1. In an action at law to recover rent, a judgment in favor of the landlord, in summary proceedings, to dispossess the defendant for non-payment of the same rent, founded on an affidavit, which, as required by the statute, furnished proof of the tenancy, the amount of rent due, and the non-payment, is conclusive; and it makes no difference that the judgment was taken by default. *N. Y. Com. Pl.*, 1872, *Powers v. Witty*, 42 *How. Pr.*, 352.
2. Where rent is, by the lease, payable monthly, the lessor's claims for the rent of the several successive months are severable and assignable, and a judgment against the tenant for the rent of one month, in favor of an assignee of the lessor's claim for that month's rent, is not conclusive against the tenant in an action by another person as assignee of a subsequent month's rent; for it is not a judgment between the same parties. *N. Y. Com. Pl.*, 1871, *Brennan v. Blath*, 3 *Daly*, 478.
3. In an action by a bailee for hire, to recover compensation for the keeping of a horse, the owner set up an alleged conversion of the horse by the bailee, as a bar, but the defense was overruled, and

FORMER ADJUDICATION.

- the bailee recovered judgment.—*Held*, that the judgment was a bar to a separate action for conversion. *Ct. of App.*, 1871, *Collins v. Bennett*, 46 *N. Y.*, 490.
4. On a question of title to land, a former judgment may be used as an estoppel, although no land whatever be described in the record, on its being shown by parol that the title to the same land involved in the existing controversy was material, and in fact investigated and determined, in the former action. [8 *Wend.* 9.] *Supreme Ct.*, 1871, *Frantz v. Ireland*, 4 *Lans.*, 278.
 5. The rule that a judgment is final and conclusive upon the parties to it, as to all matters which might have been litigated and decided in the action, is applicable to such matters only as might have been used as a defense in that action, against an adverse claim therein. *Ct. of App.*, *Malony v. Horan*, *Ante*, 289.
 6. A judgment dismissing the complaint, not a bar to a new action on the same grounds. *N. Y. Com. Pl. Sp. T.*, 1879, *Ripley v. Hazelton*, 3 *Daly*, 329.
 7. Otherwise of a dismissal for want of merits. *N. Y. Com. Pl. Sp. T.*, 1871, *Derby v. Hartman*, 3 *Daly*, 459.
 8. A judgment roll in an action which contains a verdict and judgment rendered in favor of the defendant, is conclusive as to how the fact was, until set aside, although an order that the plaintiff be nonsuited and judgment be entered for the defendant, appears to have been entered at the same circuit in which the judgment shows the trial was had. *Supreme Ct.*, 1871, *Frantz v. Ireland*, 4 *Lans.*, 278.
 9. A judgment holding attachment creditors to be tortfeasors in levying on property which their debtor had assigned, recovered on the ground that their attachment had been *set aside for irregularity*, is no bar to a subsequent action by them to set aside the same assignment, on the same ground of fraud, on which they had attempted to disregard it in levying. *Supreme Ct.*, 1871, *Yates v. Lyon*, 61 *Barb.*, 205.
 10. An order made in a court of another State, in an action for divorce, denying an application for temporary alimony, is not an adjudication which bars a similar application in another action brought in this State. *Ct. of App.*, 1871, *Brinkley v. Brinkley*, 47 *N. Y.*, 40.
 11. Effect, on wife's right of divorce, of a judgment setting aside as fraudulent a deed conveying the land. *Malony v. Horan*, *Ante* 289.

JUDGMENT; JUSTICE'S COURT, 4; PENALTY.

INDICTMENT.

GRAND JURY.

1. Two grand juries allowed to sit in New York city. 1 *Laws of* 1872, ch. 59; amending *Laws of* 1870, ch. 539, § 27.
2. Grand jury to be charged as to violation of obscene articles act. 2 *Laws of* 1872, ch. 747.

GUARDIAN.

EXECUTORS AND ADMINISTRATORS, 9; INFANTS, 8.

HIGHWAYS.

If highway commissioners neglect for thirty days after request, to apply to the county court for appointment of commissioners to assess highway damages, the court may appoint, on application of a land owner. *Laws of* 1872, ch. 315, adding this provision to 1 *Laws of* 1847, p. 580, ch. 455; by which the act of 1845 was amended.

HUSBAND AND WIFE.

1. A married woman owning real estate as tenant in common with her husband, can maintain an action for partition against her husband in her own name. [Code, § 114; *Laws of* 1862, 343, ch. 172, § 3.] *Ct. of App.*, 1872, *Moore v. Moore*, 47 *N. Y.*, 467.
2. Under the acts of 1862, a wife may maintain an action against her husband to recover possession of real estate and damages for the wrongful withholding of the same; as she previously might maintain an equity suit against him. The reasons for not allowing her to sue him for a personal tort [42 *Barb.*, 642; 44 *Id.*, 366], do not apply to actions concerning property. *Supreme Ct.*, 1870, *Minier v. Minier*, 4 *Lans.*, 421.
3. Facts requisite to maintain an action against a married woman. *Foster v. Conger*, 42 *How. Pr.*, 176; *Wood v. Sanchey*, 3 *Daly*, 197.
4. Mortgagee enjoined from disposing of property under mortgage given by wife to prevent her husband from being imprisoned under an order of arrest in an action on a doubtful claim. *Jones v. Diederich*, 3 *Daly*, 177. And see PARTIES.

IMPRISONMENT.

1. Jail limits of Albany identical with corporate limits. *Laws of* 1872, ch. 16.
2. Jail limits in Jefferson county defined. *Laws of* 1872, ch. 538.

INDICTMENT.

1. An indictment for obtaining goods by false pretenses,—*Held*, sufficient, where it charged that the accused, with intent feloniously to

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cheat and defraud A., did knowingly represent to him that a bank check, which he then and there delivered to him [describing it], was a good and genuine check, and that accused had money on deposit in said bank, and said check would be paid on presentation, when he had no money there, &c. *Ct. of App.*, 1872, *Smith v. People*, 47 *N. Y.*, 303.

2. Under 2 *Rev. Stat.*, 727, § 44, as amended by ch. 431, *Laws of* 1860, in order to give the court of a county other than that where the crime is charged to have been committed, jurisdiction to try an offense relating to embezzlements by carriers, &c., under 2 *Rev. Stat.*, 679, § 62, as amended by *Laws of* 1865, ch. 729, the indictment must allege that the crime was committed "on board the boat or other vessel," and that the boat or vessel, on that trip or voyage, had passed through some part of the county in which the prisoner is indicted, and both these facts must be proven upon the trial. *Supreme Ct.*, 1871, *Larkin v. People*, 61 *Barb.*, 226.
3. An indictment for perjury, which charged the offense to have been committed in an action pending in the supreme court of the city of New York; or of the city and county of New York, instead of "of the State of New York, in, and for, &c.,—and which did not allege the offense to have been committed in that county, nor show that the testimony was material,—*Held*, defective in substance. *Supreme Ct.*, 1871, *Guston v. People*, 4 *Lans.*, 487; *S. C.*, 61 *Barb.*, 35.

INFANTS.

1. An infant cannot, by himself or by his guardian, submit a controversy without action, under section 372 of the Code. [9 *Abb. Pr.*, 33.] Against infants, the facts must be proved. *Supreme Ct.*, 1871, *Lathers v. Fish*, 4 *Lans.*, 213.
2. The defense of infancy is personal, and can be pleaded only by the infant. It cannot be pleaded by one who gave him a negotiable instrument which he has assigned, if the infant, after coming of age, does not repudiate the transaction. *Supreme Ct.*, 1871, *Blake v. Supervisors of Livingston Co.*, 61 *Barb.*, 149.
3. Certain sales by special guardians of infants, prior to 1852, confirmed, notwithstanding the omission of signature to deed. *Laws of* 1872, ch. 524.

EXECUTORS AND ADMINISTRATORS, 9.

INJUNCTION.

1. A court of equity will restrain, by injunction, the carrying on of a factory, in such a manner as to emit a sulphurous gas, which is occasionally borne by the winds over the neighboring premises of the

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- plaintiff, destroying vegetation, and compelling the closing of windows, and irritating and inflaming the throats of those who breathe it. *Brooklyn City Ct. Sp. T.*, 1872, *Mulligan v. Elias*, *Ante*, 259.
2. The principles applicable to enjoining nuisances in growing towns, at the suit of inhabitants who have settled near the offensive establishment. *Ib.*
 3. The cases in which, and extent to which, equity will enjoin illegal assessments by municipal corporations, at the suit of a tax-payer. *Crevier v. Mayor, &c., of New York*, *Ante*, 340.
 4. Where the complaint alleged that the city authorities had entered into a contract to have certain improvements made, for which work, drafts on time were given upon the city treasurer; and set out that the authorities had no power to make such contract, or give such drafts, but did not show that plaintiff's property had been interfered with, nor that any assessment had been made, or tax levied to raise funds to meet the drafts,—*Held*, that an equitable action would not lie to enjoin the proceedings. *Supreme Ct.*, 1871, *Phelps v. City of Watertown*, 61 *Barb.*, 121.
 5. Members of a municipal council cannot enjoin the council from arresting them illegally to compel their attendance on a meeting. *Burch v. Cavanaugh*, *Ante*, 410.
 6. The court will not restrain, by injunction, the execution of a void warrant in summary proceedings for the recovery of land, if the party in whose favor the warrant issued is irresponsible, and plaintiff had, therefore, no adequate remedy at law. *N. Y. Com. Pl. Sp. T.*, 1869, *Welz v. Niles*, 3 *Daly*, 172.
 7. Equity will not, by injunction, at the suit of a stockholder in a business corporation, interfere with the general management of the corporation property,—such as the mode of investing its surplus moneys,—unless there be a clear violation of express law, or a wide departure from charter powers. *Supreme Ct. Sp. T.*, 1872, *Bach v. Pacific Mail Steamship Co.*, *Ante*, 373.
 8. Nor will it forbid a corporation to reduce its capital stock in a mode authorized by law, on a mere apprehension that the corporation may become unable to pay its debts, and that plaintiff's individual liability for such debts will be increased by the reduction. *N. Y. Com. Pl. Sp. T.*, 1872, *Joslyn v. Pacific Mail Steamship Co.*, *Ante*, 329.
 9. The intention of the corporation to use its assets to reduce the capital, cannot be shown by affidavits on information and belief. *Ib.*
 10. What is a dedication to the public, which will prevent a composer from enjoining a publication of his composition, not authorized by him. *N. Y. Com. Pl. Sp. T.*, 1872, *Wall v. Gordon*, *Ante*, 349; *Palmer v. De Witt*, 47 *N. Y.*, 532.

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11. To obtain an injunction against the unauthorized use of a firm name, actual damage or loss to plaintiffs need not be shown. *N. Y. Superior Ct. Sp. T.*, 1871, *Reeves v. Denicke*, *Ante*, 92.
12. An injunction should not be granted where the damages are capable of being estimated by a money standard, and the defendant is able to respond. *Supreme Ct. Sp. T.*, 1872, *Swett v. City of Troy*, *Ante*, 100.
13. Defendant had judgment in the New York marine court, and plaintiff appealed directly to the New York common pleas, which reversed the judgment. Subsequently it was decided by the court of appeals that the common pleas had no jurisdiction of such an appeal, and defendant then issued execution on his judgment in the marine court.—*Held*, that the plaintiff's mistake in appealing to the common pleas was a mistake of law, and a court of equity would not stay defendant's proceedings. *Ct. of App.*, 1871, *Jacobs v. Morange*, 47 *N. Y.*, 57; reversing in effect, 1 *Daly*, 523.
14. An injunction against the sale of a pew for non-payment of assessments, should not be granted merely because plaintiff will thereby be deprived of his proportion of the proceeds of the sale of the church edifice at the expiration of the lease of the land upon which it stands. *N. Y. Com. FL*, 1869, *Abernethy v. Society of Church of Puritans*, 3 *Daly*, 1.
14. An injunction should not be refused on the ground that plaintiff insists on his legal right from a bad motive. *Ct. of App.*, 1871, *Clinton v. Myers*, 46 *N. Y.*, 511.
15. An injunction forbidding a railroad company to lease or sell any part of their property, would suspend the "general and ordinary business of a corporation," within section 224 of the Code, and cannot be granted by a county judge. *Supreme Ct. Sp. T.*, 1872, *Town of Middletown v. Rondout & Oswego R. R. Co.*, *Ante*, 276.
16. *It seems*, that an injunction restraining the corporation from entering into a particular contract for the building and equipping of the road would be of the same nature. *Id.*
17. Preliminary injunctions are to be granted reluctantly, and should be dissolved if not necessary to temporary protection pending the litigation. *Supreme Ct. Sp. T.*, 1872, *Van Veghten v. Howland*, *Ante*, 461.
18. A preliminary injunction should not be granted where there is no pressing injury or danger in delay,—*e. g.*, to restrain a trespass by raftsmen in using an island having no buildings, and but slight cultivation. *Supreme Ct. Sp. T.*, 1872, *Murray v. Knapp*, 42 *How. Pr.*, 462.
19. Under rule 94,—which requires, that where an injunction is

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- granted *ex parte*, it shall contain an order to show cause on some day within ten days, why such order should not be continued,—it is not essential that the order to show cause be returnable before the court; but it may be made by any judge according to section 401, subd. 3, and be made returnable before the same judge, although he be not within the judicial district where the action is triable. *Supreme Ct.*, 1871, *Harold v. Hefferman*, 42 *How. Pr.*, 241.
20. The Code of Procedure (§ 225) authorizes a motion to dissolve a preliminary injunction before an answer to the complaint is put in. *Supreme Ct. Sp. T.*, 1872, *Town of Middletown v. Rondout & Oswego R. R. Co.*, *Ante*, 276.
21. Where the facts alleged in the complaint, and on which the equities for a preliminary injunction are founded, are all positively denied by the answer, and it appears to be extremely doubtful whether the plaintiff will ultimately be entitled to the relief demanded, the injunction cannot be sustained. *N. Y. Com. Pl.*, 1871, *Steinberg v. O'Conner*, 42 *How. Pr.*, 52.
22. The granting or dissolving of a preliminary injunction, when incidental to the relief sought, and not the principal thing demanded, is discretionary with the court; and an appeal from their order cannot be taken to the court of appeals. *Ct. of App.*, 1872, *Paul v. Munger*, 47 *N. Y.*, 469.
23. General counsel fees and costs paid in defense of an injunction suit are not to be included in the damages sustained by reason of the injunction, within the meaning of the ordinary undertaking,—where other relief was sought beside the injunction. In such a case, if the injunction is not dissolved on application, but on trial of the cause, the costs, &c., sought to be recovered must be shown to have been incurred in respect to the injunction alone. *N. Y. Superior Ct.*, 1872, *Hovey v. Rubber Tip Co.*, *Ante*, 360.

EQUITY; FORECLOSURE, 1; HUSBAND AND WIFE, 4.

INSOLVENCY.

1. The order to show cause required by section 3 of 2 *Rev. Stat.*, 29, "Of voluntary assignments by insolvents, &c.," is an incident of the jurisdiction acquired by the officer before whom the proceedings are commenced, but not essential to it. *N. Y. Com. Pl. Sp. T.*, 1871, *Matter of Jacobs*, *Ante*, 273.
2. An order to show cause why the debtor should not be discharged before one of the judges (naming him) of the court of common pleas in and for the city and county of New York, is a sufficient compliance with the statute as to specifying the place of return. *Ib.*
3. In the absence of dispute on the part of the opposing creditors,
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- where a court has judicial cognizance of the absence from the county of his residence, of the officer before whom the proceedings were commenced, the fact of absence is to be regarded as established. *Ib.*
4. The State insolvent laws which provide for causes and remedies other than those mentioned in the bankrupt act of Congress, are not suspended by the passage of that act. *Ib.*

INSURANCE.

Demand of payment of premium note, when necessary. *Sands v. Lilienthal*, 46 *N. Y.*, 541.

INTEREST.

A mortgagee who has received a surplus, from the purchaser, upon a statute foreclosure sale of a prior mortgage, is not liable to a subsequent judgment creditor for interest upon the balance of surplus, after deducting the amount of the second mortgage, except from the time of notice or demand of the claim. The commencement of suit is sufficient demand for this purpose. [1 *Robt.*, 14; 6 *Johns. Ch.*, 353.] *Supreme Ct.*, 1871, *Russell v. Duflon*, 4 *Lans.*, 399.

ISSUE.

ANSWER; PLEADING.

JOINT LIABILITY.

A director and stockholder of the corporation who, with a co-defendant, had the control of its manufacturing, is jointly liable with the corporation, for damages caused by the explosion of a boiler used by it, which was made under his order and direction. [30 *N. Y.*, 78.] *Supreme Ct.*, 1871, *Losee v. Buchanan*, 61 *Barb.*, 88.

JUDGE.

The affinity between a father-in-law and his son-in-law, while the wife is living, is a disqualification under 2 *Rev. Stat.*, 275, § 2. *Supreme Ct.*, 1871, *Rivenburgh v. Henness*, 4 *Lans.*, 208.

INJUNCTION, 15, 19; MOTIONS AND ORDERS.

JUDGMENT.

1. Where the defendants in order to relieve their lands from surface water, deepened a ditch upon the highway, and thus caused an increased and unnatural flow of water on to the lands of the plaintiffs below,—*Held*, that a judgment compelling the filling of the ditch to its former level, and restraining the defendants from low-

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- ering it again, was the proper remedy. [40 N. Y., 191.] *Supreme Ct.*, 1871, *Foot v. Bronson*, 4 *Lans.*, 47.
2. In an action by a judgment creditor of a husband against the husband and wife, to reach land conveyed to the wife, but for which no consideration money was paid by the husband, where the wife dies after issue joined in the action, if plaintiff fails in impeaching the title of the wife, he cannot have the husband's estate in the land as tenant by the curtesy sold to satisfy his judgment. The complaint did not allege this estate; and as it did not vest until after putting in of the answer, the defendant did not, by proceeding with the suit, submit to the court proceeding to give relief, notwithstanding the existence of a legal remedy by execution. *Ct. of App.*, 1872, *Curtis v. Fox*, 47 *N. Y.*, 299.
 3. The provision contained in 2 *Laws of* 1871, p. 1270, ch. 583, § 5,—forbidding judgments against the city of New York, except on verdict of a jury, &c.,—is not unconstitutional. *Supreme Ct.*, 1872, *Lewenthal v. Mayor, &c., of City of New York*, 61 *Barb.*, 511.
 4. The provisions of 2 *Laws of* 1871, p. 1270, ch. 583, § 5,—that no judgment against the city and county of New York shall be paid unless an appropriation has been made; and no judgment, excepting on issues of law, shall be entered up, hereafter, against the city or county of New York, except upon a verdict by a jury,—shall not be held or construed in any manner to refer to or affect the entry of judgments in any action tried and determined before the passage of said last mentioned act. *Laws of* 1872, ch. 514.
 5. The *bona fide* holders of a note recovered judgment upon it against the maker and indorsers, which they assigned to their immediate indorser.—*Held*, that the latter held the judgment subject to the rights of the maker, against the note while in his hands, and that he (the indorser), having received the note in payment of a precedent debt, through the fraud of his debtors upon the maker, equity would relieve the maker from an enforcement of the judgment against him, by the assignee. *Supreme Ct.*, 1871, *Coleman v. Lansing*, 4 *Lans.*, 70.
 6. M., holding a judgment against the plaintiff for more than two thousand dollars, offered to take five hundred dollars in satisfaction, which offer was not accepted. R., a stranger to plaintiff, by false representations that he acted for plaintiff, induced M. to assign the judgment to him (R.) for five hundred dollars.—*Held*, that M. was the only party injured: that plaintiff was a stranger to the transaction and had no interest in it and was not entitled to ratify the assignment, and could not maintain an action to secure its benefit. *Ct. of App.*, 1871, *Garvey v. Jarvis*, 46 *N. Y.*, 310; affirming 54 *Barb.*, 179.
 7. Judgment by default, set aside on excuse and on affidavits that

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- defendant had given plaintiff his notes for the greater part of the debt, which were not due when the action was brought. *Rowles v. Hoare*, 61 *Barb.*, 266.
8. A statute superseding the lien of judgments, on lands taken for public use on compensation to the "owner" is valid; for the lien of a judgment upon real estate being purely statutory, the legislature may abolish it at any time before rights have become vested under it. *Ct. of App.*, 1872, *Watson v. N. Y. Central R. R. Co.*, 47 *N. Y.*, 157; affirming 6 *Abb. Pr. N. S.*, 91.
 9. An entry made in the docket book (after filing a satisfaction piece of a judgment), under the heading "when satisfied" referring to the judgment, the entry consisting of the words and figures "April 11, 1864, S. P.," is a sufficient cancellation. The long-continued and uniform practice of canceling judgments only by a memorandum on the docket, amounts to a practical construction of the statute (2 *Rev. Stat.*, 362, § 22). *Supreme Ct.*, 1871, *Booth v. Farmers' and Mechanic's National Bank*, 4 *Lans.*, 301.
 10. In making entries upon the docket the clerk acts in a ministerial capacity, and his erroneous or false entries,—*e.g.*, marking a judgment satisfied by one who had previously assigned it,—cannot conclude the parties, even to protect a purchaser of lands in good faith. Parties must see that the clerk had due authority. *Id.*
 11. A clerk is not authorized, by a satisfaction piece purporting to refer to a judgment against "L. and others," to cancel the docket of a judgment obtained by the same plaintiff against M. & G., in an action where L. was made a party but not served; and this, although the facts sustain the moral conviction that this was the judgment intended to be discharged. *Id.*

FORMER ADJUDICATION; JUSTICES' COURT, 4; LANDLORD AND
TENANT; NEW TRIAL; SATISFACTION.

JUDICIAL ACT.

FORECLOSURE, 2; MANDAMUS.

JURISDICTION.

1. Service in this State, of the process of a court of another State, gives no jurisdiction to such court to decree a divorce. *Supreme Ct.*, 1871, *Holmes v. Holmes*, 4 *Lans.*, 388; reversing 8 *Abb. Pr. N. S.*, 1; 57 *Barb.*, 305.
2. The stipulation of a foreign seaman, in his shipping articles, not to bring any dispute or quarrel that he may have with the master or his substitute, before any court but that of his own country, will

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- be regarded by the courts of this State, and they will refuse to entertain an action by him, unless the voyage, as respects him, was brought to an end in our ports without any wrongful act on his part. *N. Y. Com. Pl.*, 1869, *Olsen v. Schierenberg*, 3 *Daly*, 100.
3. Doubts as to *jurisdiction*, in criminal cases, are not necessarily to be solved in favor of the accused, but may be solved in favor of the court having exercised it, unless established rules of law will be palpably violated thereby. *Ct. of App.*, 1872, *Smith v. People*, 47 *N. Y.*, 330.
 4. A State court has jurisdiction of an action upon a bond conditioned to pay a sum of money, if, on examination of the record at Washington, and of U. S. letters patent, the patent be not found valid. [2 *Paige*, 132.] *Ct. of App.*, 1872, *Middlebrook v. Broadbent*, 47 *N. Y.*, 443.
 5. Where the court has jurisdiction of the subject matter, any defect in the proceeding to bring the defendant into court is waived by his voluntarily appearing in the action; unless such appearance is specially to protest against the jurisdiction, or in proceedings instituted to set aside some act of the court or its officers without jurisdiction, and to the prejudice of the party. *N. Y. Com. Pl. Sp. T.*, 1872, *Allen v. Malcolm*, *Ante*, 335.
 6. The act of Congress, "to limit the liability of shipowners," &c., passed March 3, 1851 (9 *U. S. Stat. at L.*, 635, 636), substitutes the proceeding *in rem* for the common law action for recovery of damages against the owner of a vessel not "used in rivers or inland navigation," within the United States; and the United States district court has exclusive jurisdiction of such case. *Supreme Ct.*, 1871, *Baird v. Daly*, 4 *Lans.*, 426. To the same effect, 1872, *Chisholm v. Northern Transportation Co.*, 61 *Barb.*, 363.
 7. But an action by a passenger, founded on neglect to comply with the provisions of the act of 1852, ch. 106, as to steam vessels, or neglect of known imperfections in the steam apparatus or hull (if recovery is not sought for any specific penalty prescribed by the act), is a remedy which can be afforded at common law, and, therefore, may be brought in a State court. *Ib.*
 8. In such action recovery can only be had for injury to the person or the baggage of a passenger. *Ib.*

MARINE COURT; MUNICIPAL CORPORATIONS; RELIGIOUS CORPORATIONS.

JURY.

1. Act relating to exemption from jury duty in New York city. *Laws of 1872*, ch. 535.

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2. One employed in an establishment where castings, farming implements, and machinery, are made from melted pig and old iron, is not within the provisions of the statute exempting persons from jury duty who are "in the actual employment of any glass, cotton, linen, woolen or iron manufacturing company by the year, month, or season." [2 Rev. Stat., 415, § 33.] Manufacturing means making from raw materials. *Supreme Ct.*, 1871, *People ex rel. Blake v. Holdridge*, 4 *Lans.*, 511.
3. *It seems*, that a partner having an interest in the profits, and employed by the company by the year, is within the meaning of the act. *Ib.*
4. Act relating to petit jurors in Westchester county. *Laws of 1872*, ch. 499.
5. Opinion or expression thereof not a ground for challenge for principal cause, if the juror "declare on oath that he verily believes that he can render an impartial verdict according to the evidence submitted to the jury on such trial, and that such previously formed opinion or impression will not bias or influence his verdict," and if the court be satisfied that the person so proposed as a juror does not entertain such a present opinion as would influence his verdict as a juror. *Laws of 1872*, ch. 475, § 1.
6. The people and the accused, in all capital cases, shall also be entitled to thirty peremptory challenges. *Id.*, § 2.

JUSTICES' COURTS.

1. To entitle one as matter of right to an adjournment on account of the absence of a witness, it is not enough for the party to show that he was advised by counsel that the witness was material, without showing either what the witness knew, or that counsel knew what he would prove, or that the party could not safely proceed to trial without him. The refusal of such an application is not an abuse of discretion. [50 *Barb.*, 354.] *Supreme Ct.*, 1870, *Burgett v. Edwards*, 4 *Lans.*, 193.
2. It is not error to refuse an application for attachment against the witness on the same facts, for they do not prove that he is material. *Ib.*
3. In an action brought on an undertaking given in a justice's court, in an action for chattels, it is error to nonsuit the plaintiff, on the ground that an execution has not been regularly issued and returned unsatisfied, according to sections 64 and 65, 2 *Rev. Stat.*, 533 (which have been retained in the 5th edition of the *Rev. Stat.*, vol. 3, 848, as sections 25 and 26). These sections are not applicable to this class of actions when commenced in a justice's court. *Supreme Ct.*, 1871, *Letson v. Dodge*, 61 *Barb.*, 125.

LANDLORD AND TENANT.

4. Where, in a justice's court, the merits are fairly entered into, investigated, and the case is finally submitted to the justice, who gives a judgment for the defendant, though without costs, it is conclusive on the plaintiff, a bar to another action, and a final determination, from which an appeal will lie. [11 Johns., 458; 3 Hill, 237; 10 Abb. Pr., 64.] *N. Y. Com. Pl.*, 1869, *Blum v. Hartman*, 3 *Daly*, 47.
5. On appeal from a justice's judgment, notice stating "that judgment should have been more favorable to the appellant in this particular, to wit: that said judgment should not have been for more than a certain sum (specifying it), besides costs," is a sufficient statement of the particulars of error, and of the amount for which judgment should have been given, to require the respondent to offer to reduce it, and to entitle appellant to costs, when the respondent, without offering to reduce it, recover in the county court less than the original judgment. *Ct. of App.*, 1871, *Youngehouse v. Fingar*, 47 *N. Y.*, 99. To the contrary, *Bancroft v. Shannon*, 42 *How., Pr.*, 1.
6. On appeal to a county court, from the judgment of a justice of the peace, where the respondent has offered to allow the amount of the judgment to be reduced to a certain sum, and the offer is refused by the appellant, and afterwards, on a trial in the county court, he recovers damages and interest thereon from the time the appeal was taken, this interest cannot be estimated in determining whether, under section 371 of the Code, the recovery is more or less favorable to the appellant than the offer of the respondent. *Ct. of App.*, 1871, *Pike v. Johnson*, 47 *N. Y.*, 1.

LACHES.

DISMISSAL OF COMPLAINT; PLEADING.

LANDLORD AND TENANT.

1. What constitutes eviction and exonerates from liability for rent. *Johnson v. Oppenheim*, *Ante*, 449.
2. Although judgment for recovery of possession under which a tenant surrenders, is rendered in consequence of the tenant's violation of his covenants, he may set up the eviction in defense, in an action for subsequent rent. The rule cannot be applied that one cannot take advantage of his own wrong. The rights of the party claiming rent cannot be litigated in the action for possession. His remedy is by action for the breach of those covenants. *Ct. of App.*, 1871, *Home Life Ins. Co. v. Sherman*, 46 *N. Y.*, 370.

SUMMARY PROCEEDINGS.

DAMAGES.

LEASE.

1. Rules applicable to covenants restricting uses of premises, and implied covenants for tenantableness. *Johnson v. Oppenheim, Ante, 449.*
2. A lessee of mortgaged premises, under an unexpired lease, with a covenant of quiet enjoyment, has a right to receive from the surplus moneys remaining after foreclosure and sale, the annual value of the premises for the unexpired term (which depends upon the circumstances of the case), less the rents and other payments to which he would be subject under the lease. *Ct. of App., 1871, Clarkson v. Skidmore, 46 N. Y., 297; modifying 2 Lans., 238.*
3. The lessee's interest is not subject to the claims of the mortgagee or other claims against the estate of the lessor, when the lessor is bound to protect him against these claims. When two parties are claimants of a fund in court, equity should not permit one of them, who has covenanted to protect the title of the other, to increase his own share of the fund by compelling the share of the other to contribute to the discharge of prior incumbrances on the property. *Ib.*

LEVY.

EXECUTION.

LIMITATIONS OF ACTIONS.

1. In an action in this State, upon a covenant between parties resident of another State,—*Held*, that the limitation began to run from the beginning of defendant's residence here. *Supreme Ct., 1871, Hall v. Robbins, 4 Lans., 463.*
2. The statute in relation to persons in the United States service (*Laws of 1864, ch. 578, § 2, p. 1332*), is not retroactive. *Ct. of App., 1872, Stone v. Flower, 47 N. Y., 566.*
3. The statute of limitations commences to run immediately against a promissory note payable on demand, whether with or without interest; and an action on it against the maker is barred at the expiration of six years from its execution. [*Distinguishing 23 N. Y., 28.*] *Ct. of App., 1872, Wheeler v. Warner, 47 N. Y., 519.*
4. Where a premium note, given to a fire insurance company, prior to the act of 1853, was assessed to its full value, the time of payment fixed, and the required notices of such facts were given,—*Held*, that payment was due at the date fixed, without personal demand; and an action brought six years thereafter was barred. *Ct. of App., 1871, Sands v. Lilienthal, 46 N. Y., 541.*

LIMITATIONS OF ACTIONS.

5. The fact that a conveyance, made when the grantor is insolvent, is without consideration, is a controlling fact on the question whether the conveyance was made to defraud creditors; and lack of knowledge of the want of consideration, is lack of knowledge of the fraud, and will, *it seems*, prevent the statute of limitations from running against a creditor. *Ct. of App.*, 1872, *Erickson v. Quinn*, 47 *N. Y.*, 410. Compare 3 *Lana.*, 299.
6. Where fraudulent representations are made upon a sale of real estate, in regard to incumbrances, the cause of action accrues the moment the bargain is completed by the conveyance of the premises to the purchaser, and from that time the statute of limitations runs, no matter when the fraud is discovered. [5 *Wend.*, 30; 17 *Id.*, 202; 5 *Barn. & C.*, 149.] *Supreme Ct.*, 1871, *Northrop v. Hill*, 61 *Barb.*, 136.
7. For conversion of pledge, time runs from demand, not from prior payment of the debt to secure which the pledge was held. *Roberts v. Berdell*, 61 *Barb.*, 37.
8. In an action by the State to forfeit the charter of a turnpike, &c. company, on the ground of misuser, the objection that the acts complained of occurred more than twenty years before suit brought, is not available unless taken by answer. But after the lapse of so long a period as fifty years, original defects in the construction of the road, not shown to have been permanent and to render the road injurious or inconvenient to the public, are not sufficient to warrant a forfeiture. To warrant a forfeiture it must be alleged and found that the want of repair was such as to render the road dangerous or inconvenient to travelers. A finding which would be satisfied by a single omission during the period of fifty years, is not enough. The franchise not having been originally usurped but legally vested, the verdict to sustain a forfeiture, must show not merely a breach of the letter of the condition subsequent, but of its intent and meaning, and find such facts as the court may adjudge a substantial breach. [23 *Wend.*, 587.] *Ct. of App.*, 1872, *People v. Williamsburgh Turnpike R., &c. Co.*, 47 *N. Y.*, 586.
9. An action to set aside a deed of land for the incapacity of the grantor, is an action for the recovery of real property, and the limitation is governed by chapter 2 of the Code, not by chapter 3, which relates to "time of commencing actions *other* than for the recovery of real property." *Supreme Ct.*, 1871, *Marvin v. Lewis*, 61 *Barb.*, 49.
10. Payments on a debt which is barred by the statute of limitations, made to the widow of the creditor, dying intestate, though made before she has taken out letters of administration, will take the debt

MANDAMUS.

out of the statute, so as to enable her to maintain a suit on it as administratrix upon taking out letters. *Supreme Ct.*, 1872, *Townsend v. Ingersoll*, *Ante*, 354.

11. When the statute of limitations has run against a claim of an intestate, it is not revived as to his estate by the payment of a part thereof, out of funds which are the separate property of the administratrix, if such part payment is made without her knowledge. And it seems, even if made specifically by her direction it would not bind the estate. Otherwise if a payment of interest on a debt not outlawed, is made out of the assets of the estate, though by one only of several administrators. [36 N. Y., 88.] *Supreme Ct.*, 1871, *Heath v. Grenell*, 61 *Barb.*, 190.

LIS PENDENS.

ATTACHMENT; NOTICE.

LOAN COMMISSIONERS.

1. Under the act of 1837, as to publication of a notice of sale (as under the provisions of the Revised Statutes, relating to the notices of sheriff's sales of real estate), publication once in each week for six successive weeks, is sufficient, notwithstanding there were less than forty-two days between the first publication and the day of sale. [21 N. Y., 150; 7 *Barb.*, 39; 5 N. Y., 497.] *Supreme Ct.*, 1871, *Wood v. Terry*, 4 *Lans.*, 80.
2. The statute as to the entries to be made by the commissioners is directory merely; and the omission to make them does not affect the regularity of sales made by them. *Id.*

MALICIOUS PROSECUTION.

COMPLAINT, 5.

MANDAMUS.

1. The rules that, to entitle a party to a mandamus, he must have a clear legal right to the relief demanded, and that a mandamus will not lie, where the party has a plain legal remedy by action,—applied to the case of a claim against a town, for a proportion of moneys paid the town by the State, for a substitute, alleged to have been furnished jointly by the town and the relator, and whose services constituted a part of the excess of years. [Laws of 1870, ch. 436.] *Ct. of App.*, 1871, *Holden v. Putnam Fire Ins. Co.*, 46 N. Y., 9.
2. Mandamus does not lie to compel a board of police commissioners

MARINE COURT OF NEW YORK.

- to reinstate an officer whom they have discharged for disqualification, after an examination of the charge, on due notice to him, and on his appearance. Such a trial and discharge is a judicial act. *Supreme Ct. Sp. T.*, 1871, *People ex rel. Grace v. Police Commissioners of Troy*, *Ante*, 181.
3. General allegations on information, &c., not sufficient in affidavit to oppose application. *People ex rel. Cornell v. Norton*, *Ante*, 47.
 4. Upon an order to show cause why the defendant should not do a certain thing "or for such other relief," &c., a mandamus may be granted for any relief to which the party is entitled, although not specified in the order. *Ct. of App.*, 1871, *People ex rel. Henry v. Nostrand*, 46 *N. Y.*, 375.
 5. The writ need only describe the thing to be done with such certainty that the defendant may know what is required of him. It is enough to inform public officers in a general way, what their duty is, and to command its performance, unless they can justify or excuse the neglect. *Ct. of App.*, 1871, *People ex rel. Henry v. Nostrand*, 46 *N. Y.*, 375.

MARINE COURT OF NEW YORK.

1. This court declared a court of record, and its jurisdiction enlarged and proceedings regulated, and assimilated to actions under the Code of Procedure.* 2 *Laws of 1872*, ch. 629.
2. Act relating to the clerks of the court. 2 *Laws of 1872*, p. 1411, ch. 579.
3. The marine court cannot give purely equitable relief. *N. Y. Com. Pl.*, 1869, *McMahon v. Rauhr*, 3 *Daly*, 116.
4. A cause in the marine court cannot be tried by a jury, unless a jury is demanded by a party after issue joined and before adjournment. The defendant does not waive his objection to a subsequent order for a jury trial, by appearing and trying the cause before the jury. *N. Y. Com. Pl.*, 1869, *Mooney v. Hudson River R. R. Co.*, 3 *Daly*, 105.
5. The marine court has no power to refer the issues in a cause, unless the trial will require the examination of a long account. Hence, a reference ordered in an action where the sole issue was fraud, is an irregularity, and renders void subsequent proceedings in the action. *N. Y. Com. Pl.*, 1870, *Leland v. Smith*, 3 *Daly*, 309.
6. The court cannot deprive a party of his statutory right of a full notice of trial, unless it is waived, or unless conditions are imposed on him on granting him a favor. *Id.*

* Supersedes *Fitzsimmons v. Baxter*, 3 *Daly*, 81, where it was held that unknown owners could not be sued in this court by fictitious names as under the Code.

MECHANICS' LIENS.

7. The general term of the marine court may review, on appeal, any intermediate order made in the action, involving the merits and necessarily affecting the judgment. *Ib.*
8. The court of common pleas may control the execution of a judgment of the marine court, after a transcript has been filed in the county clerk's office; and will do this on a motion to vacate the judgment, and for other relief, &c. *Ib.*
9. An action commenced in the marine court, by attachment, in which the defendant is not personally served, and does not appear, and judgment is taken by default, is in the nature of actions *in rem*, and the execution in the action can only be enforced against the attached property. *N. Y. Com. Pl.*, 1871, *Goodkind v. Strickland*, 3 *Daly*, 420.
10. Where a transcript of such a judgment was filed in the office of the clerk of New York, and an execution issued to Westchester to be levied on other property, the common pleas will, on motion, set aside the execution, for irregularity. *Ib.*
11. Mode of service of notice of appeal, and effect of omission. *Hoffenberth v. Muller*, *Ante*, 221.
12. It is only on the ground of irregularity, that the common pleas can review an order of the marine court denying a motion to open a default or trial. *N. Y. Com. Pl.*, 1870, *Bixby v. Bennett*, 3 *Daly*, 225.
13. A reversal of judgment, with order for a new trial, does not constitute such an actual determination of the action in the marine court, as authorizes an appeal thereon to the court of common pleas. *N. Y. Com. Pl.*, 1871, *Frank v. Benner*, 3 *Daly*, 422.
14. On appeal from the marine court, the court of common pleas cannot consider affidavits contradicting the return. If the return is untrue, the remedy is by action against the justice for a false return. *N. Y. Com. Pl.*, 1869, *Fitzsimmons v. Baxter*, 3 *Daly*, 81.
15. Where the recovery was less than fifty dollars,—*Held*, that an allowance granted by the justice in the marine court, of twenty-five dollars, was within his discretion. *Ib.*

MARRIED WOMEN.

Actions against married women now subject to same rules as actions against *femes sole*. *Foster v. Conger*, 61 *Barb.*, 145.

HUSBAND AND WIFE; PARTIES.

MECHANICS' LIENS.

1. Mechanics' lien laws extended to wharves, piers, bulkheads and bridges. Liens thereon to be filed within thirty days of performance of last work, or delivery of materials. *Laws of 1872*, ch. 669.

MECHANICS' LIENS.

2. The mechanics' lien law for the city of New York (*Laws of 1851*, ch. 513, as amended by *Laws of 1855*, ch. 404), does not give a lien upon a public building, under a contract by a public officer. *Ct. of App.*, 1872, *Poillon v. Mayor, &c., of New York*,* 47 *N. Y.*, 666.
3. Holder of legal title deemed the owner, although he held it subject to a trust. *Ct. of App.*, 1872, *Anderson v. Dillaye*,* 47 *N. Y.*, 678.
4. Contractor may include his *per diem* charge additional to the wages of workmen, and may do so under a notice and bill of particulars which does not state that charge separately from the wages. *Id.*
5. A mason holding an architect's certificate, that an installment was due him, under his contract, gave a material-man an order on the owners for the amount thereof, and on the owners' promise to pay it, the material-man made further deliveries for the work,—*Held*, that this was an equitable assignment of the amount, assented to by the owner to take effect when subsequent payments became due, and as such, the material-man was entitled to be paid, in preference to a mechanics' lien subsequently filed. *Supreme Ct.*, 1872, *Young Stone Dressing Co. v. Wardens, &c. of St. James' Church*, 61 *Barb.*, 489.
6. The provision of section 13 of the lien law for the city of New York, which forbids a transfer of the contractor's interest in the contract, does not forbid assignment of an installment due, and only applies to a contract between parties having liens, and not between a creditor and the owner of the building. *So held*, as against a subsequently filed lien, in a case where the mason, having installments to become due to him on his building contract, assigned some of such installments, with the owner's consent, in payment of stone used in the building. *Id.*
7. Where no proceedings for the foreclosure of the lien have been instituted within the year, defendant is entitled as of strict right to have the lien discharged by order of a judge, upon due proof that the year has elapsed, that no proceedings have been had, and upon the certificate of the clerk that no notice of any proceedings have been filed with him. *N. Y. Com. Pl.*, 1870, *Stone v. Smith*, 3 *Daly*, 213.
8. The remedy of the owner of premises against which a mechanic's lien is filed, to remove and discharge the lien, is by a motion, on notice to the lienors under statute, and not by an action in equity. *N. Y. Com. Pl. Sp. T.*, 1869, *Spratt v. Nicholson*, 3 *Daly*, 182.

* No opinion reported.

MOTIONS AND ORDERS.

MISTAKE.

1. Action to *reform* a contract for mistake lies only where *mutual* mistake or fraud is shown. *O'Donnell v. Harmon*, 3 *Daly*, 424.
Otherwise of an action to *rescind*. *Smith v. Mackin*, 4 *Lans.*, 41.
2. A party does not waive his right to bring an action to reform a mortgage made by him under a mistake of fact by making payments according to it under protest, and by delaying (in this case six months) to commence his suit. *Ct. of App.*, 1872, *Andrews v. Gillespie*, 47 *N. Y.*, 487.
3. Such mortgage may be reformed, in an action to foreclose, brought by an assignee of the mortgage, and his assignor need not be made a party. *Id.*
4. In an action to rescind a compromise of an ejectment suit, made under mistake of fact, it appeared that the plaintiff had, before bringing the action, claimed to rescind the contract, and offered to reinstate the ejectment suit, but the defendant refused to consent.—*Held*, that a judgment, directing the rescission, and not reinstating the ejectment suit, but leaving the defendant, if so advised, to recommence his ejectment, was proper. *Supreme Ct.*, 1871, *Smith v. Mackin*, 4 *Lans.*, 41.

DEFENSES, 2; DISCHARGE; INJUNCTION, 12; MOTIONS AND ORDERS, 2;
RECEIVER.

MORTGAGE.

FORECLOSURE; HUSBAND AND WIFE, 4.

MOTIONS AND ORDERS.

1. The office of a bill of particulars is to apprise the defendant of the items which the plaintiff expects to prove, and to restrict the proofs to the matters specified; and all that defendants can require is that the bill be as definite and certain as the case will admit. If the specifications do not accord with the facts, or if they omit matters essential to the plaintiff's case, the remedy is to take advantage of it on the trial, not by motion to strike out the items objected to. *Ct. of App.*, 1872, *Matthews v. Hubbard*, 47 *N. Y.*, 428.
2. If a party has mistaken the practice, and moved for an order to which he is not entitled, it must, in general, be discretionary with the court whether under the words "and for such other and further order," &c., to grant other relief or not, and the order denying such relief is not appealable to this court. *Ct. of App.*, 1871, *Van Slyke v. Hyatt*, 46 *N. Y.*, 259.

MOTIONS AND ORDERS.

3. The provision of section 401 of the Code,—authorizing the court to appoint a referee to take, for purposes of a motion, the affidavit of any person who refuses to make an affidavit,—applies only to persons not parties to the action. *N. Y. Com. Pl.*, 1869, *Hodgakin v. Atlantic & Pacific R. R. Co.*, 3 *Daly*, 70; affirming 5 *Abb. Pr. N. S.*, 73; *N. Y. Superior Ct. Sp. T.*, 1872, *Cockey v. Hurd*, *Ante*, 307.
4. The court will not determine that a statute on which the plaintiff's right to maintain the action depends, is unconstitutional, upon the hearing of a motion on affidavits. *Supreme Ct. Sp. T.*, 1871, *Havemeyer v. Ingersoll*, *Ante*, 301.
5. An order entitled as “at a special term of the supreme court and of the oyer and terminer,” signed by the judge without any direction to enter it, and directing the discharge of a prisoner held on civil process, but made without notice to the creditors in such process.—*Held*, unauthorized. *Supreme Ct.*, 1872, *People ex rel. Hewlett v. Brennan*, 61 *Barb.*, 540.
6. Orders of the supreme court, in cases pending therein, if within its jurisdiction, are valid, however irregularly they were obtained. Thus in an action against a sheriff for escape of a prisoner confined by virtue of an execution issued upon a judgment of the supreme court against his body,—*Held*, that an order of the supreme court setting aside the execution, was a defense, although made in a wrong county and without the notice of motion required by the Code. [5 *How. Pr.*, 367; 7 *Id.*, 265.] *Supreme Ct.*, 1871, *Pinckney v. Hagerman*, 4 *Lans.*, 374.
7. An injunction order restraining defendants until further order, &c., and requiring them to show cause, on a day named, why the order should not be continued, is an *ad interim* order, and ceases on the day for showing cause, unless then continued by a valid further order. *Supreme Ct. Sp. T.*, 1872, *Town of Middletown v. Rondout & Oswego R. R. Co.*, *Ante*, 276.
8. A stay of proceedings “until the further order of the court,” does not cease to operate until a further order is actually entered. A mere decision of the motion, in connection with which the stay was granted, indorsed by the judge upon the motion papers, will not operate as a *vacatur*.—*Held*, therefore, that the obtaining and issuing of an attachment, pending such stay of proceedings, was not only unlawful in itself, but might, *it seems*, be deemed sufficient to support a finding of malice in an action for false imprisonment. *N. Y. Com. Pl.*, 1869, *Ackroyd v. Ackroyd*, 3 *Daly*, 38.
9. An order made by a *judge out of court*, may be set aside by the court, on motion. The provision of section 350 of the Code, which allows certain orders made by a judge out of court, upon notice, to be en-

MUNICIPAL CORPORATIONS.

tered with the clerk, and to be appealed from,—does not preclude the remedy by motion. *Ct. of App.*, 1872, *West Side Bank v. Pugsley*, *Ante*, 28.

10. On motion to vacate a judgment, and let defendant in, if he presents a *prima facie* case on a question of law, the court will not try the question on the affidavits, but grant the motion. *Supreme Ct.*, 1870, *Rowles v. Hoare*, 61 *Barb.*, 266.

COUNTY JUDGE, 3; FORMER ADJUDICATION, 9; INJUNCTION; MANDAMUS; REFERENCE; SHERIFF.

MUNICIPAL CORPORATIONS.

1. The rule that courts of equity have no general supervisory power over the government of municipal corporations, or over the acts and proceedings of their governing bodies [14 N. Y., 534], and the limits of their interference,—reiterated. *Phelps v. City of Watertown*, 61 *Barb.*, 121.
2. In proceedings to assess lands for a local improvement in Yonkers, under the *Laws of 1863*, ch. 269, authority from the board of trustees,—the appointment of commissioners not interested,—their filing an oath,—their publishing certain notices, &c.,—are all jurisdictional requirements; and an assessment may be held void, because a commissioner was interested in property in the district; because the oath was not taken before an authorized officer; or because the required notices were not duly given. *Supreme Ct.*, 1871, *Hopkins v. Mason*, 42 *How. Pr.*, 115.
3. Petition under town bonding act of 1869, may be presented to the supreme court at special term. Judge may appoint referee. 2 *Laws of 1872*, p. 2176, ch. 883.
4. Upon a petition under *Laws of 1869*, ch. 907, praying that the “bonds of a town may be created,” in aid of a railroad company,—it must be proved that a majority of the tax-payers of the town, owning or representing a majority of the taxable property of the town, signed the petition, as a condition precedent to the exercise of the authority of the county judge, to appoint commissioners. *Ct. of App.*, 1871, *People ex rel. Freeman v. Hulburt*, 46 N. Y., 110; reversing 59 *Barb.*, 446.
5. A petitioner must either subscribe the petition himself, or that must be done by some other person by his direction and in his presence. *Supreme Ct.*, 1872, *People ex rel. Hoag v. Peck*, 42 *How. Pr.*, 425.
Or under written authority. *People ex rel. Freeman v. Hulburt*, *above*.
6. Joint owners or occupants, when to sign as one person. *People ex rel. Hoag v. Peck*, *above*.

MUNICIPAL CORPORATIONS.

7. A party signing such petition on behalf of an infant as guardian or trustee, must prove his authority. *People ex rel. Freeman v. Hulburt, above.*

When such petition is signed on behalf of a corporation it must be shown affirmatively, that such corporation exists, that it is solvent, and that those signing for it are authorized so to sign. *Ib.*

9. It cannot be urged upon appeal that no objection was taken at the hearing to the signing of names in a representative capacity without authority. It was necessary to establish the authority, to confer upon the county judge power to appoint commissioners. There was no waiver on the part of those who did not sign and who did not attend the hearing. *Ib.*

10. It is not essential that the petition show that the railroad has been located, nor that it state the mode of incorporation of the company. *People ex rel. Hoag v. Peck, above.*

11. After the county judge has acted upon the petition, a petitioner cannot legally be allowed to withdraw his assent. *Supreme Ct., 1870, People ex rel. Doty v. Henshaw, 61 Barb., 409.*

Nor upon the hearing. *People ex rel. Hoag v. Peck, above.*

12. The return to a writ of *certiorari* to review proceedings before a county judge, under the town bonding act of 1869 (*Laws of 1869, ch. 907*), stated that it was proved that each name subscribed to the petition was written by or upon the request of the person so named and whose name appeared upon the roll as a tax-payer of the town, without, however, stating the evidence.—*Held*, insufficient. The return must show jurisdiction, and a tax-payer whose name was subscribed to such petition by a third party, in pursuance of a previous verbal authority, cannot be counted as a petitioner under the act which requires a *written* petition made by the tax-payers in person. *Ct. of App., 1872, People ex rel. Allen v. Knowles, 47 N. Y., 415.*

13. *It seems*, however, it would be sufficient, if the return showed that those whose names were affixed to the petition by others were present at the time of the signing, and authorized it, or that the one who affixed the signature had written authority to do so, which written authority was annexed to the petition and presented to the county judge. *Ib.*

14. Where a new assessment roll and tax list have been made since the institution of the proceedings, although there are no defects which may not be remedied on a re-hearing, the proceedings will not be remanded under the act of 1871 (*Laws of 1871, ch. 925, § 4*). *Ib.*

NEW YORK (CITY OF); RELIGIOUS CORPORATIONS.

NEW TRIAL.

NE EXEAT.

The writ of *ne exeat*, in equitable cases, has not been abolished by the Code. [Citing conflicting cases.] *Supreme Ct.*, 1870, Beckwith v. Smith, 4 *Lans.*, 182.

NEGLIGENCE.

Grounds and limit of liability of public officers, for. *McCarthy v. City of Syracuse*, 46 *N. Y.*, 194.

NEW TRIAL.

1. A motion for new trial may be made at special term, on the ground that the verdict is against the weight of evidence, or surprise, or newly discovered evidence, or misconduct of the jury or other ground, after the entry of judgment upon the verdict. The act of 1832, chapter 12, gave the right to move before the circuit judge, and the Code substitutes the special term. *Ct. of App.*, 1871, Tracey v. Altmyer, 46 *N. Y.*, 598; *N. Y. Superior Ct.*, 1871, Raphaelsky v. Lynch, *Ante*, 224.
2. Where the evidence offered would furnish no cause of action or ground of defense, its exclusion is not error, although it be excluded on the ground of the supposed incompetency of the witness, and not on the ground of the immateriality of the evidence. *Ct. of App.*, 1872, Andrews v. Gillespie, 47 *N. Y.*, 487.
3. The rule that when illegal evidence is admitted, which bears in the least degree upon the result, it is fatal,—applied. *Baird v. Gillett*, 47 *N. Y.*, 186.
4. A purchaser of stock brought an action against his brokers, and one from whom the brokers had bought the same or similar stock at about the same time, and who had made representations to plaintiff as to its value. Plaintiff alleged a fraudulent combination to induce him to purchase, and sought to recover back the money paid by him.—*Held*, that, upon the evidence, the latter defendant was not liable. And that as the action was on the contract, and as there was no proof of demand as against such defendant, and as, without proving a combination with such defendant, there was not sufficient evidence to charge the brokers with fraud; and as evidence of contemporaneous misrepresentations by the several defendants had not been expressly limited as received against them respectively and not jointly,—the judgment must be reversed as to all the defendants, and a new trial ordered. *Supreme Ct.*, 1871, *Hubbell v. Allen*, 4 *Lans.*, 214.

NEW YORK (CITY OF).

5. Several distinct grounds of liability on the part of the defendant were submitted to the consideration of the jury, and there was a general verdict,—*Held*, that if either ground was improperly submitted, judgment could not be sustained unless it appeared that some one of the others was so clearly established by uncontroverted evidence as to have rendered it the duty of the court to direct a verdict for plaintiff. *Ct. of App.*, 1872, *Baldwin v. Burrows*, 47 *N. Y.*, 199.
6. Only in very clear cases should the court interfere with the finding of the jury on a question of negligence and contributory negligence. *Bateman v. Ruth*, 3 *Daly*, 378.
7. Where a case was decided upon the plain facts at the circuit, although the same might very properly have been submitted to the jury, had the request been made by counsel;—*Held*, that no such request having been made, and the law having been properly applied to the facts established by the evidence, it was too late to object to the decision on a motion for a new trial on that ground. *Supreme Ct.*, *Waffle v. Porter*, 61 *Barb.*, 130.
8. Effect of defendant's omitting to ask dismissal of complaint at the trial, or a verdict, on the express ground that the evidence was insufficient. *Rowe v. Stevens*, *Ante*, 389.

APPEAL.

NEW YORK (CITY OF).

1. History of the court of oyer and terminer, and the court of general sessions in the city of New York. *Smith v. People*, 47 *N. Y.*, 330.
2. Under 1 *Laws of 1870*, ch. 383, pp. 881, 917, a conviction by a single justice, in the court of special sessions of the city and county of New York, is valid, where the records show that one judge was "absent through disability," and the statement is not controverted. *Supreme Ct.*, 1872, *People v. Davis*, 61 *Barb.*, 456.
3. Local improvements in New York city regulated. 2 *Laws of 1872*, p. 1412, ch. 580.
4. Under the act to regulate street openings in New York city (2 *Rev. Laws*, 418), which provides that the mayor, &c., pay over to the persons in whose favor the commissioners may report, the sums reported as awards for the taking of lands, or, after demand therefor, be liable, in action, to those entitled to such awards, and in case the owners entitled to such awards be unknown, the mayor, &c. may pay the amount of awards into court,—an action will not lie against the city in behalf of parties who were not mentioned in the report, for sums reported due to unknown owners; but a mandamus may

NEW YORK (CITY OF).

- issue to compel the payment into court. *Supreme Ct.*, 1871, *Fisher v. Mayor of New York*, 4 *Lans.*, 451.
5. The act of 1818 (*Laws of 1818*, ch. 86, § 178), providing that upon confirmation of the report of the commissioners of estimate, &c., the corporation of New York shall be seized in fee of the lands, &c., in the report mentioned, and declaring all leases void after such confirmation, is so far modified by the act of 1818 (*Laws of New York*, p. 196), authorizing the city to suspend opening any street for any time not exceeding fifteen months, &c., that until the title of an owner is divested by possession by the city, he may recover under a lease, for use and occupation. *Ct. of App.*, 1871, *Detmold v. Drake*, 46 *N. Y.*, 318.
 6. The commissioners of estimate and assessment appointed in a proceeding to open a street in the city of New York have no authority to impose any condition to be performed by the owners of lands taken prior to payment to them of the awards made. The statute (*Laws of 1818*, ch. 86, § 178) under which such commissioners are created, being summary in its nature, should be strictly construed. *N. Y. Com. Pl.*, 1869, *Riker v. Mayor, &c. of New York*, 3 *Daly*, 174.
 7. The confirmation of the report of the commissioners by the supreme court, in a particular case, though conclusive in reference to all acts which the commissioners had the power to perform, is not so as to matters beyond their jurisdiction. *Ib.*
 8. In a report made by the commissioners of estimate and assessment for opening avenues or public places in the city of New York, there was an error in not allowing the value of streets which had been closed.—*Held*, that an order at special term by which the report was referred back for revision and correction, was proper; and it seems, such order might be repeated so long as the commissioners erred in the rules by which they were governed. *Supreme Ct.*, 1871, *Matter of Commissioners of Central Park*, 61 *Barb.*, 40.
 9. The fixing the valuation of the land is within the peculiar province of the commissioners. The court has no power to make an estimate of damages. *Ib.*
 10. Mandamus issued, to compel the commissioners of the county court house to make requisition for payment of, and the comptroller to pay, outstanding claims for work previously done on the building. *Supreme Ct. Sp. T.*, 1871, *People ex rel. Cornell v. Norton*, *Ante*, 47.
 11. Mode of giving public notice of resolutions for local improvements; advertising for proposals; making contracts therefor; and assessments including collector's fee; and the effect of the act of 1870;—determined in detail. *Matter of Douglass*, *Ante*, 161; re-

NONSUIT.

versing 9 *Id.*, 84. *Matter of Eager*, *Ante*, 151; affirming 10 *Id.*, 229; S. C., 58 *Barb.*, 557; 41 *How. Pr.*, 107.

12. The principle upon which an assessment is made, if erroneous, is not a "legal irregularity" within *Laws of* 1858, p. 574, ch. 338, § 2, and is not the subject of review in a petition under that statute. *Matter of Eager* (*above*).

COURT OF SESSIONS; GRAND JURY; JUDGMENT, 4, 5; JURY.

NONSUIT.

1. Before the Code, a motion for nonsuit brought up the question whether the proof was sufficient to support the declaration, and if the plaintiff proved his case as laid, the motion would be denied, because the sufficiency of the declaration could be tested only by demurrer, or by a motion in arrest of judgment. But since the Code, the defendant does not waive the objection that the complaint does not state facts sufficient to constitute a cause of action by omitting to raise it by answer or by a demurrer. He may take the objection at the trial by a motion for nonsuit; and if it does not appear that he omitted to take it there, he can raise it upon appeal. *N. Y. Com. Pl.*, 1869, *Abernethy v. Church of the Puritans*, 3 *Daly*, 1.
2. In an action by an administrator, under *Laws of* 1847, ch. 450 (amended by *Laws of* 1849, ch. 256), to recover damages for the death of his intestate, a nonsuit or a direction to find nominal damages only, cannot be given merely because there is no proof of special pecuniary damage to the next of kin, resulting from the death of the deceased. [14 *N. Y.*, 310, 319; 38 *Id.*, 445, 450.] *Ct. of App.*, 1872, *Ihl v. Forty-second, &c. R. R. Co.*, 47 *N. Y.*, 317.
3. The rule that where no ground for a nonsuit is stated, it is not error to deny a motion for it, even though there may be a defect in plaintiff's proof, if the defect be such that it could be supplied if it were pointed out on the motion,—applied. *Ct. of App.*, 1871, *Mallory v. Travelers' Ins. Co.*, 47 *N. Y.*, 52.
4. Where, upon a trial before a referee, the plaintiff at the close of his evidence is nonsuited and excepts thereto, a question of law is raised on which an appeal may be taken through the general term to the court of appeals. Granting a nonsuit is equivalent to deciding that there was no evidence to sustain plaintiff's case; and the nonsuit should be set aside if there was evidence sufficient to go to a jury on a jury trial, even though the appellate court may be of opinion that a verdict or finding for defendant on such evidence might be sustained. *Ct. of App.*, 1872, *Scofield v. Hernandez*, 47 *N. Y.*, 313.

FORMER ADJUDICATION; PLEADING, 18.

PARTIES.

NOTARIES.

1. Notaries of the counties of New York or Kings, may act in either county, equally. *Laws of 1872*, p. 1680, ch. 703, § 1.
2. In any affidavit or the proof or acknowledgment of any instrument taken under this act, to be used or recorded in this State, in a county other than that in and for which the notary shall have been appointed, he shall state in the body of such affidavit, or certificate of proof or acknowledgment, or after his signature thereto, as such notary, the name of the county for which he was appointed; and to entitle the instrument to be recorded in any other county there must be attached to his certificate of proof or acknowledgment, a certificate under the hand and official seal of the clerk of the county for which such notary was appointed, specifying that "he was at the time of taking such proof or acknowledgment a notary public in and for said county, commissioned and sworn and duly authorized to take the same; that such clerk is well acquainted with the handwriting of such notary, and verily believes that the signature to said certificate of proof or acknowledgment is genuine." *Id.*, § 2.

PROTEST.

NOTICE.

COMPLAINT, 2; DEED; EVIDENCE, 18, 19; JUSTICE'S COURT, 5, 6;
RAILROAD COMPANIES; RECORDING DEEDS.

OFFICER.

1. When a person sets up a title to property, by virtue of an office, and comes into court to recover it, he must show an unquestionable right. It is not enough that he is an officer *de facto*, he must be an officer *de jure* and have a right to act. [1 Den., 574; and cases cited.] *Ct. of App.*, 1871, *People ex rel. Henry v. Nostrand*, 46 N. Y., 375.
2. Construction of statutes disqualifying incumbents of one class of offices, from election, &c., to others. *People ex rel. Furman v. Clute*, *Ante*, 399.

EVIDENCE; MANDAMUS; NEGLIGENCE.

PARTIES.

1. An alien friend, equally with a citizen, may sue in our courts for protection of his literary property. *Ct. of App.*, 1872, *Palmer v. De Witt*, 47 N. Y., 532.
2. Capacity to sue, of one who was domiciled within the Confederate lines, but escaped, and made a contract at the North on behalf of his firm at the South. *Leftwich v. Clinton*, 4 *Lans.*, 176.

PARTIES.

3. One who received from C. a negotiable promissory note, and undertook to collect it at his own expense, and to pay C. six hundred dollars when it was collected,—*Held*, the party in interest under section 111 of the Code, so as to enable him to sue on it. *Ct. of App.*, 1872, *Eaton v. Alger*, 47 *N. Y.*, 345; affirming 57 *Barb.*, 179.
4. Under section 113 of the Code, an action on a life insurance policy made payable to the assured, his executors, administrators, or assigns, but for the benefit of a third person, is properly brought by the administratrix of the assured. *Ct. of App.*, 1872, *Greenfield v. Mass. Mut. Life Ins. Co.*, 47 *N. Y.*, 430.
5. Where goods have been delivered to the consignee's carrier, in such way as to pass the title, an action for their loss cannot be brought by the consignor. The owner must sue. [Reviewing cases.] *Ct. of App.*, 1871, *Krulder v. Ellison*, 47 *N. Y.*, 36.
6. The rule that where one under a duty to the public, contracts with another, who thereby agrees to perform that duty, and on failure of performance, the first is made to answer in damages for an injury resulting thereby, he may have an action to recover from his covenantor the amount he has been compelled to pay,—expounded and applied. *City of Brooklyn v. Brooklyn City R. R. Co.*, 47 *N. Y.*, 475.
7. A married woman may maintain an action against her husband and his partners, to recover her property, or collect her claims from the firm. And *it seems*, she might sue her husband on a contract made with him. *Supreme Ct.*, 1870, *Adams v. Curtis*, 4 *Lans.*, 164.
8. What separate business need be shown to sustain her contract,—considered. *Id.*
9. Separate proprietors of distinct parcels of land may join in an action for redress of a private injury common to them all. [Hopk., 416; 1 *Barb.*, 59; 3 *Barb.*, 157.] *Supreme Ct.*, 1871, *Foot v. Bronson*, 4 *Lans.*, 47.
10. One who aided and directed in lowering the ditch which caused the injury, may be joined as a defendant, although he was not interested in the lands benefited. *Id.*
11. The rights of the members of a voluntary association for pleasure purposes, in regard to the property of the association, are the same as those of partners in business; and all actions at law on contracts made with the association must be brought by all the members, and one member of such an association cannot sue another *at law* for breach of a contract made with the association. *Ct. of App.*, 1871, *McMahon v. Rauhr*, 47 *N. Y.*, 67; reversing 3 *Daly*, 116.
12. Plaintiffs and defendants jointly purchased real estate, which they subsequently conveyed to a petroleum company, receiving in payment, shares of its stock, which were distributed among them

PARTIES.

- proportionately to their interests in the land.—*Held*, that there was not such a mutuality of interest between the parties, as to make applicable the rule which precludes one partner from suing another; and the plaintiffs could sue defendants for damages for fraud practiced on them in the purchase of the land. *N. Y. Com. Pl.*, 1869, *Dart v. Walker*, 3 *Daly*, 136.
13. Tenants having assigned to the administratrix their claims to the return of money paid to a receiver by mistake,—*Held*, that the action was properly brought by her, for the benefit of the estate. *City Ct. of Brooklyn*, 1872, *Barker v. Clark*, *Ante*, 106.
 14. It cannot be considered on appeal that the administratrix, the widow of the intestate had (and that the receiver therefore, acquired), the title to one undivided third of the rents, it not appearing that the rents were the surplus remaining after payment of the debts of the intestate, nor that such claim was made or suggested on the trial of the cause. *Ib.*
 15. An action to set aside a lease which suspends the ordinary business of a corporation for more than one year, may be brought by a stockholder in the lessor's corporation who has not consented to or ratified the execution of such lease, on behalf of himself and all other stockholders similarly situated. *Supreme Ct.*, 1871, *Copeland v. Citizens' Gas Light Co.*, 61 *Barb.*, 60.
 16. *It seems*, that the representatives of a deceased indorser of a promissory note may be properly joined as co-defendants in a suit against the maker. *Ct. of App.*, 1872, *Eaton v. Alger*, 47 *N. Y.*, 345; affirming 57 *Barb.*, 179.
 17. Both principal and agent cannot be sued together on a contract made by the agent in his own name for the benefit of his principal. The party with whom the contract is made must elect. *N. Y. Com. Pl. Sp. T.*, 1870, *Borell v. Newell*, 3 *Daly*, 233.
 18. Under *Laws of 1860* (as amended by *Laws of 1862*, ch. 172), the joinder of the husband with the wife is not necessary, in an action for fraud in a contract for the sale of real estate of the latter, made by the former, as the agent of his wife. She is liable as a *feme sole* for torts committed in the management of her separate estate, as distinguished from mere personal torts. *Ct. of App.*, 1872, *Baum v. Mullen*, 47 *N. Y.*, 577.
 19. It is error to hold, in a case where an injury done by a corporation was occasioned by the negligence or unskillfulness of the agent who put the corporation in motion, that the *inanimate corporation*, and not the *controlling agent*, is liable. There is joint liability. *Supreme Ct.*, 1868, *Losee v. Buchanan*, 61 *Barb.*, 88.

PARTIES.

20. In ejectment for premises occupied by the tenants of one claiming title adverse to plaintiff, the landlord is a proper party; and by not objecting by demurrer or answer, he waives the objection that the tenant is not also made a party defendant. *Ct. of App.*, 1872, *Finnegan v. Carraher*, 47 *N. Y.*, 493; affirming 61 *Barb.*, 252.
21. Defendant and two others purchased oil lands for seventeen thousand dollars,—and the agent of defendant represented to plaintiff (who knew nothing of the other two), that the land would be bought for fifty thousand dollars and induced him to pay one thousand dollars for one-fiftieth share. The agent paid over the money to his principal, the defendant, who shared it with the two others.—*Held*, that plaintiff could maintain an action against the defendant, to recover the over-payment of six hundred dollars, without joining the others. *Ct. of App.*, 1872, *Leslie v. Wiley*, 47 *N. Y.*, 648.
22. An assignee in bankruptcy is a necessary party to a suit to foreclose a mortgage on the bankrupt's land, and if he is not joined he may afterward bring a suit to redeem; but he cannot, under any provision of the Bankrupt Law or otherwise recover against the mortgagee of the purchaser at the mortgage sale, a personal judgment for the value of his interest in the mortgaged premises. *Ct. of App.*, 1872, *Winslow v. Clark*, 47 *N. Y.*, 261; reversing 2 *Lans.*, 377.
23. In an action against a mortgagee, to redeem land sold under a defective foreclosure, and bought in by the mortgagee, the grantee of the mortgagee who is in possession of the premises is a necessary party. *Ct. of App.*, 1872, *Winslow v. Clark*, 47 *N. Y.*, 261.
24. Where the vendor in a contract for sale of land enters into a new contract to sell the same land to a second purchaser, the latter is a necessary party in an action by the former purchaser, to enforce specific performance of the first contract. *Supreme Ct.*, 1871, *Fulleton v. McCurdy*, 4 *Lans.*, 132.
25. The act of 1835, ch. 211, § 2,—which provided that where default was obtained against part of the defendants, the plaintiffs might proceed against the other parties, in the same manner as if the suit had been commenced against such other parties, and the action should be thereby severed,—is inconsistent with the provisions of the Code, and therefore repealed by section 468. *Supreme Ct.*, 1871, *Genet v. Lawyer*, 61 *Barb.*, 211.
26. Under our Code, § 121, an action is not abated by the death of a sole defendant, if the cause of action survive and continue. *Supreme Ct.*, 1872, *Livermore v. Bainbridge*, 61 *Barb.*, 358; affirming 42 *How. Pr.*, 53.
27. After the death of a sole party, his representatives, having an interest in the suit, may have an order to continue it. *Id.*

PARTITION.

28. The several owners of a vessel are tenants in common, and must join or be joined in an action, on contract, against them. If joined as defendants and the death of one of them occurs, his executor or personal representative cannot be joined with the survivors. The executor is charged *de bonis testatoris*, the survivors *de bonis propriis*, and the judgment could not be thus rendered. *N. Y. Com. Pl. Sp. T.*, 1870, *Wright v. Marshall*, 3 *Daly*, 331.
29. In an action against the owners of a vessel, one of the defendants, who was not served, died before trial.—*Held*, on a motion by the surviving defendants to compel the plaintiff to bring in as parties defendant the personal representative of the deceased, that the contract set up being the joint obligation of the owners, the plaintiff might proceed to trial against the defendants served under section 136. of the Code, and the motion should be denied. *Id.*
30. Where an action is brought by judgment creditors to set aside, as fraudulent and void, an assignment made by partners in trust for the benefit of creditors, it is no ground for a dismissal of the complaint or for nonsuit, that one of the parties, though named in the summons and complaint, has not been served with process, nor appeared in the action. The action was to reach the joint property, and judgment could be rendered so as to bind the joint property, with such service or appearance of one defendant. *Supreme Ct.*, 1871, *Yates v. Lyon*, 61 *Barb.*, 205.
31. One who is not named as a party, but on whom, by mistake, the summons is served, is not entitled to appear and answer; and if he insist on doing so, his answer may be stricken out with costs. *Supreme Ct. Sp. T.*, 1872, *Abeel v. Conhyser*, 42 *How. Pr.*, 252.
- BASTARDY, 1; CHATTELS, 1; DEPOSITION; HUSBAND AND WIFE, 1-3; JOINT LIABILITY; JUDGMENT, 2; NEGLIGENCE; SATISFACTION PIECE.

PARTNERSHIP.

- A purchaser of all of the partnership property of a firm, on their dissolution, does not thereby acquire the right to use the firm name. *N. Y. Superior Ct. Sp. T.*, 1871, *Reeves v. Denicke*, *Ante*, 92.
- EVIDENCE, 14, 23; PARTIES, 12.

PARTITION.

1. Since the act of 1847 (*Laws of 1847*, ch. 430), a tenant in common of a vested remainder in real estate may institute an action for the partition of the estate, notwithstanding there is a tenant for life of

PLACE OF TRIAL.

- the whole estate in possession. [15 N. Y., 623.] *N. Y. Com. Pl. Sp. T.*, 1869, *McGlone v. Goodwin*, 3 *Daly*, 185.
2. A subsisting adverse possession is an absolute bar to an action for partition. Plaintiff must have possession, actual or constructive, in common with defendant, to maintain the action. *Ct. of App.*, 1871, *Florence v. Hopkins*, 46 *N. Y.*, 182.
 3. A sale, in partition, of lands owned by descent, as distinguished from a sale under a power in a will, does not convert an infant's share into personalty. *Ct. of App.*, 1871, *Horton v. McCoy*, 47 *N. Y.*, 21.

PERJURY.

INDICTMENT.

PENALTIES.

1. Meaning of "penalty" in a charter of a municipal corporation. *Village of Lancaster v. Richardson*, 4 *Lans.*, 136.
2. A statute imposing a penalty for knowingly doing certain fraudulent acts, is construed to mean actual, guilty knowledge, which must be proved, and which cannot be presumed or inferred merely from the acts of others, and their relation to the defendant. *Supreme Ct.*, 1871, *Verona Central Cheese Factory v. Murtaugh*, 4 *Lans.*, 17.

PETITION.

MUNICIPAL CORPORATIONS; RELIGIOUS CORPORATION.

PLACE OF TRIAL.

1. The maker and indorser of negotiable paper, when sued together, are each entitled to the same relief,—*e. g.*, to a change of the place of trial as to himself,—as if sued separately. *Supreme Ct. Sp. T.*, 1872, *Sherman v. Gregory*, 42 *How. Pr.*, 481.
2. After a demand by one for a change of place of trial has been refused, both may join in a motion to compel the change. *Id.*
3. The right to change the place of trial in an action against an unincorporated association sued under the acts of 1849 and 1853, by the name of its officers, depends on the residence of the officers who are named as defendants, not on the place of business of the association. *Supreme Ct.*, 1872, *Bacon v. Dinsmore*, 42 *How. Pr.*, 368.
4. On a motion to change the place of trial to the proper county,—*i. e.*, to a county where some of the parties reside,—an affidavit of merits is not necessary. Section 46 of the judiciary act of 1847, which required it, was repealed by the Laws of 1847, ch. 470, § 17. *Supreme Ct. Sp. T.*, 1872, *Sherman v. Gregory*, 42 *How. Pr.*, 481.

PLEADING.

PLEADING.

1. *It seems*, that 2 *Rev. Stat.*, 480, § 1, authorizing a short mode of pleading in penal actions, by referring simply to the statute,—is repealed by the Code. *Abbott v. N. Y. Central, &c. R. R. Co.*, *Ante*, 465.
2. The provision in 2 *Laws of 1867*, p. 1606, § 6, that thereafter all actions against the mayor, aldermen, and commonalty of New York, should be brought in the supreme court, which court shall have exclusive cognizance of such actions,—is a public, and not a private provision, and need not be pleaded.* *N. Y. Com. Pl.*, 1869, *McLain v. Mayor, &c.*, of New York, 3 *Daly*, 32.
3. A complaint averring that A. & B. applied to plaintiff for a loan, and as a condition of the loan and as security for its payment they made the promissory note sued on (which was payable to plaintiff), “and the said defendants, C. & B., then and there indorsed the same to the plaintiff,” sufficiently avers that the indorsement was a condition of the loan; and under such averment evidence of the indorser's privity with the negotiation and its result, is admissible. And, the note being set out in the complaint, the words “value received,” in it are sufficient averment of consideration. *Ct. of App.*, 1872, *Meyer v. Hibsher*, 47 *N. Y.*, 265.
4. An action against executors, where they are sued *as* executors, and not merely described as such, cannot be converted into one against the defendants individually, without amendment; and if the contract sued on was an executory contract, made by the executors upon a new and independent consideration, as distinguished from a consideration moving to the testator in his lifetime, the complaint is demurrable. *Ct. of App.*, 1872, *Austin v. Munro*, 47 *N. Y.*, 360; affirming 4 *Lans.*, 67.
5. In a joint action by highway commissioners of two towns, for money paid, if separate payments do not appear from the complaint, it may be presumed, on demurrer for misjoinder, that they had joint funds. *Supreme Ct.*, 1871, *Corey v. Rice*, 4 *Lans.*, 141.
6. In an action against a Massachusetts life insurance company, the complaint admitted the non-payment of premiums, but alleged there was due on a policy issued by the company to plaintiff's intestate under the Massachusetts non-forfeiture act, which was set forth, a certain sum, which defendant had promised to pay.—*Held*, it was an action on the policy, and not on an account stated, and that, under a general denial in the answer, defendants might show

* On the question of constitutionality, this case must be deemed overruled by decisions of the court of appeals.

PLEADING.

- that under the act there was nothing due. *Ct. of App.*, 1872, *Greenfield v. Mass. Mut. Life Ins. Co.*, 47 *N. Y.*, 430.
7. A memorandum check may be received in evidence under a general count for money had and received. *City Ct. of Brooklyn*, 1872. *Turnbull v. Osborne*, *Ante*, 200.
 8. The word *memorandum*, written across the face of the instrument, is a part of it. *Ib.*
 9. Such a check is to be distinguished from the common check, and is an unconditional promise to pay the money therein mentioned, presentment and notice waived. *Ib.*
 10. The provisions of the Code, sections 149 and 150,—requiring partial defenses to be pleaded,—are applicable to matters in mitigation of damages, so far at least as those matters occur after the act complained of as the cause of action, and out of the presence of the plaintiff. Thus in an action for damages for levying under an attachment, which was subsequently set aside for irregularity, evidence that the same property was subsequently lovi^ed on by defendant, under a new and valid attachment, is not admissible if not set up in the answer. *N. Y. Com. Pl.*, 1872, *Wehle v. Haviland*, 42 *How. Pr.*, 399.
 11. Under a general denial in an answer to a complaint for goods sold and delivered, defendants may show that they had revoked the agency of the person who purchased the goods in their name, and that plaintiffs had notice of such revocation. *Ct. of App.*, 1872, *Hier v. Grant*, 47 *N. Y.*, 278.
 12. Evidence of the way in which the alleged agent carried on business, and of the fact that no freight bill was presented to defendants, is also competent. *Ib.*
 13. Under a complaint alleging the death of the intestate, and the due and legal appointment of the plaintiff as the administrator of the estate, and an answer containing only a general denial of these allegations, the letters of administration in due form, produced in evidence, are sufficient to establish the representative character in which the plaintiff assumes to sue. [2 *Rev. Stat.*, 80, §§ 56, 58; 2 *Steph. N. P.*, 1904; *Stark. on Ev.*, 9 *Am. ed.*, *394, 361; 3 *Phil. on Ev.*, *665, 548; 10 *Pick.*, 515; 10 *N. H.*, 242; 8 *Cow.*, 333.] *Ct. of App.*, 1872, *Belden v. Meeker*, 47 *N. Y.*, 307.
 14. A judgment of a court of concurrent jurisdiction, relied on as a former adjudication, can be given in evidence under any form of pleading which amounts to a general denial of the matter in respect to which it is conclusive. *N. Y. Com. Pl.*, 1871, *Derby v. Hartman*, 3 *Daly*, 458.
 15. In an action for a conversion of goods, a subsequent valid sale,

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- on an execution in defendant's favor and against plaintiff, is a defense, and does not go in mitigation of damages; and must be specially pleaded. Evidence of it cannot be introduced under a general denial. *N. Y. Superior Ct.*, 1871, *Wehle v. Butler*, *Ante*, 139.
16. In an action for specific performance, if the answer admits the contract, and does not plead the statute of frauds, defendants are deemed to have renounced the benefit of it and cannot object on appeal, that no contract, valid by the statute, was proved. *Ct. of App.*, 1871, *Duffy v. O'Donovan*, 46 *N. Y.*, 223.
 17. Where a complaint upon a promissory note alleged a making and delivery of the note to the payee, and a sale and delivery thereof to plaintiff, who was owner, &c., the answer admitted the "making and delivery of said note," as averred in the complaint, but denied each and every other allegation, and set up payment,—*Held*, that the answer put in issue the sale and delivery, and authorized proof on the part of defendant that the payee was, in fact, the owner, and that the note had been paid to him. *Ct. of App.*, 1871, *Allis v. Leonard*, 46 *N. Y.*, 688.
 18. On a trial before a referee, the plaintiffs failed to establish a cause of action against the defendants for trespass, which was founded on the alleged invalidity of a will, but did make out a right of action for waste, founded on the validity of the will. No application was made upon the trial to amend the pleadings or to apply the law to the facts proving waste.—*Held*, that the complaint was properly dismissed. *Supreme Ct.*, 1871, *Tracy v. Ames*, 4 *Lans.*, 500.
 19. Under a complaint for the unlawful and violent taking of a chattel, a recovery for a sum far exceeding its value, on proof of an unlawful entry on plaintiff's premises, cannot be sustained. *N. Y. Com. Pl.*, 1869, *Kenny v. Planer*, 3 *Daly*, 131.
 20. The word "may" in section 177 of the Code, is permissive, and therefore the right to interpose a supplemental answer is not absolute, but is in the discretion of the court. *Ct. of App.*, 1871, *Medbury v. Swan*, 46 *N. Y.*, 200.
 21. An answer insufficient in form or substance is not necessarily frivolous. That only is frivolous, which appears so, incontrovertibly, by a bare statement of it, without argument. *Ct. of App.*, 1871, *Youngs v. Kent*, 46 *N. Y.*, 672; reversing 2 *Sweeney*, 248.
 22. Laches in making an application for leave to serve a supplemental answer, setting up a discharge in bankruptcy, is sufficient ground for denying the application. *Ct. of App.*, 1871, *Medbury v. Swan*, 46 *N. Y.*, 200.
 23. Where an answer puts in issue material allegations of the com-

QUESTIONS OF LAW AND FACT.

plaint, although it may appear that in its preparation such allegations were not intended to be controverted, the court cannot, by a summary judgment, deprive the defendant of the right of a trial of the issue thus formed. Thus in an action for the price of a quantity of goods sold, the answer alleged that the sale was by sample, and a specified quantity was not according to the sample (see 2 Sweeny, 248), and denied all the allegations of the complaint not admitted (see 46 N. Y., 673).—*Held*, that the quantity sold was not admitted; and the answer was not frivolous. *Ct. of App.*, 1871, *Youngs v. Kent*, 46 N. Y., 672; reversing 2 *Sweeny*, 248.

24. Leave to amend a pleading on the trial may be refused, in the discretion of the court; and should never be granted where it would raise a new issue which would operate as a surprise upon a party. *N. Y. Superior Ct.*, 1872, *Johnson v. Oppenheim*, *Ante*, 449.

COSTS, 4; EVIDENCE, 26-28; TRIAL.

PROBATE.

WILL.

PROHIBITION.

A writ of prohibition should not be issued against a county judge to prohibit him from proceeding on an application to bond a city or a town for railroad purposes, for the statute furnishes review by *certiorari*. *Supreme Ct. Sp. T.*, 1871, *People ex rel. City of Albany v. Clute*, 42 *How. Pr.*, 157.

POOR.

An order under 1 *Rev. Stat.*, 614, reciting that two persons liable for the support of a poor person are of sufficient ability, and apportioning the payment between them, though unequally, is valid. *Ct. of App.*, 1872, *Stone v. Burgess*, 47 N. Y., 521.

PROTEST.

General election day made a holiday, under *Laws of 1870*, ch. 370. 2 *Laws of 1872*, p. 1255, ch. 544.

PUBLICATION.

TIME.

QUESTIONS OF LAW AND FACT.

1. Where there is no dispute about the authority conferred upon an agent, the question whether an act done is within the power, is a ques-

RAILROAD COMPANIES.

- tion of law for the court, precisely as it would be if the power was in writing. The court, and not the jury, must construe it so as to determine whether the agent's acts are authorized by the power. [26 Barb., 256; 1 Hilt., 366.] *Supreme Ct.*, 1871, *Coykendall v. Eaton*, 42 *How. Pr.*, 378.
1. In an action against a master for an assault committed by his servant, the question whether the act complained of was willful and malicious, or was done necessarily by the servant in the discharge of his duty, is a question of fact for the jury. *Ct. of App.* 1872, *Jackson v. Second-ave. R. R. Co.*, 47 *N. Y.*, 276.
 3. The question whether a purchaser of land contracted for it with reference to its condition in respect to other land of his vendor, is a question for the jury. *Ct. of App.*, 1871, *Curtis v. Ayrault*, 47 *N. Y.*, 73.
 4. The question of the extent to which the owner of land may interfere with the use of a private way, to which it is subject, by gates or bars, depends upon the purposes for which the way is used, and the necessity for their erection to protect his property, and is in every case a question for the jury. *Supreme Ct.*, 1871, *Huson v. Young*, 4 *Lans.*, 63.
 5. In an action against a contractor for injuries caused by the plaintiff's falling into an excavation made in a public street, insufficiently guarded and lighted, it is a question of fact for the jury to determine, on conflicting testimony, whether at the time of the accident the excavation was without a sufficient guard or light. *N. Y. Com. Pl.*, 1871, *Bateman v. Ruth*, 3 *Daly*, 378.
 6. It is also a question for the jury in such a case, under proper instruction by the court, whether the plaintiff was guilty of contributory negligence. Where such a question is involved, and the jury were properly instructed, the court will not set aside the verdict, unless the case is so clear as to show that the jury must have been influenced by prejudice, or carried away, by the advocacy of counsel, or by some other cause, from the consideration of the facts. *Id.*

RAILROAD COMPANIES.

1. Mode of proceeding for appointment of commissioners of appraisal, &c. Requisites of map; proceedings to change route, &c. *New York & Boston R. R. Co. v. Godwin*, *Ante*, 21; *Wallkill Valley R. R. Co. v. Norton*, *Ante*, 317.
2. Under an act (*Laws of 1836*, ch. 242; *Laws of 1843*, ch. 169) which does not, like the general railroad act, require notice to incumbrancers of land to be taken, but only designates "owners," judgment creditors holding liens are not protected. Payment of com-

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- pensation to the owner transfers the title discharged of the lien. *Ct. of App.*, 1872, *Watson v. N. Y. Central, &c. R. R. Co.*, 47 *N. Y.*, 157; affirming 6 *Abb. Pr. N. S.*, 91.
3. Those laws taken in connection with *Laws of* 1834, ch. 228, substituted the vice-chancellor for the county judge as the officer before whom the proceedings were to be had. *Ib.*
 4. The fact that there are other lands in the vicinity of those which the corporation seeks to take, under the statute, equally adapted to its use, and which may be purchased, is no ground for refusing their application. The selection of lands for its uses is committed by the legislature to the discretion of the corporation, and courts cannot supervise it. *Ct. of App.*, 1871, *N. Y. & Harlem R. R. Co. v. Kip*, 46 *N. Y.*, 546; affirming 11 *Abb. Pr. N. S.*, 90.
 5. On an application to change the route of railroad, it is not for the court to pass on the merits of the question, but only to ascertain whether sufficient cause exists for the appointment of commissioners, who shall determine the merits. *Supreme Ct. Sp. T.*, 1871, *Norton v. Wallkill Valley R. R. Co.*, 42 *Hov. Pr.*, 228.
 6. Right of recovery of penalties for taking excessive fares. *Fisher v. N. Y. Central R. R. Co.*, 46 *N. Y.*, 644.
 7. The term "laborer" and "labor," as used in the general railroad act of 1850 [*Laws of* 1850, ch. 140, § 112, giving remedy for contractor's debts], are used in their ordinary and usual sense; and the word "laborer" cannot be construed as designating one who contracts for and furnishes the labor and service of others. [6 *Abb. Pr. N. S.*, 329.] To give an enlarged meaning to the words quoted, would lead to mischief in the interpretation of statutes. *Ct. of App.*, 1871, *Balch v. New York & Oswego Midland R. R. Co.*, 46 *N. Y.*, 521.
 8. A contract for a specific sum as wages by time, is not necessary, to enable the laborer to recover against a railroad company, under *Laws of* 1850, 140, § 12, for services rendered to its contractors. An implied contract to pay what the labor is worth is sufficient. *Supreme Ct.*, 1871, *Chapman v. Black River R. R. Co.*, 4 *Lans.*, 96.
 9. The notice which, by section 12, must be served within twenty days of the completion of the labor for which claim is made, may be served on the chief engineer of the road; although the section upon which work was performed was in charge of an assistant engineer, and at his office the notice was served on the chief. *Ib.*
 10. Grounds and limit of liability for lost baggage. *Green v. N. Y. Central R. R. Co.*, *Ante*, 473.

For negligence of servants, and for employing careless and incapable servants. *Baulec v. N. Y. & Harlem R. R. Co.*, *Ante*, 310.

REFERENCE.

RECEIVER.

1. A receiver of a corporation cannot be appointed in an action brought by the attorney-general for forfeiture of charter, until after judgment. *Supreme Ct.*, 1871, *Gilman v. Green Point Sugar Co.*, 4 *Lans.*, 482.
2. A receiver of an insurance company, appointed pending an action in which the company is plaintiff, may continue the action in the name of the company. The appointment of a receiver does not dissolve the corporation, but it is still capable of bringing an action. [Hill & Den., 398; 2 Robt., 278.] The appointment of the receiver only transfers to him the property of the corporation, including the right of action involved. He may, therefore, continue the action in the name of the original party. *Supreme Ct. Sp. T.*, 1872, *Albany City Ins. Co. v. Van Vranken*, 42 *How. Pr.*, 281.
3. Money collected by a receiver of a debtor, which belonged to an estate of which the debtor was administratrix, is deemed to have been paid under mistake, and may be recovered back. *City Ct. of Brooklyn*, *Barker v. Clark*, *Ante*, 106.
4. Receiver to whom no assignment has been made, may sue to set aside a fraudulent conveyance. *N. Y. Com. Pl. Sp. T.*, 1872, *Foster v. Townsend*, *Ante*, 469.
5. In such a suit all parties claiming an interest in the land, or who united in the illegal act, may be made parties defendant. *Ib.*
6. To what extent an irregular order appointing a receiver is a protection to him; the rules applicable to disbursements, and employment of assistance, and the settlement of his accounts; and the general duties of a receiver,—determined. *Corey v. Long*, *Ante*, 427.

SUPPLEMENTARY PROCEEDINGS.

RECORDING DEEDS.

The title of a wife who mortgages her separate estate to secure her husband's debt, being on record, the mortgagee is chargeable with knowledge of the fact that she was owner, and mortgaged as surety. *Ct. of App.*, 1871, *Bank of Albion v. Burns*, 46 *N. Y.*, 170; affirming 2 *Lans.*, 52.

REDEMPTION.

CAUSE OF ACTION, 2.

REFERENCE.

1. In what cases a compulsory reference may be directed; and when it should be refused on account of causing delay. *Godfrey v. Williamsburgh Fire Ins. Co.*, *Ante*, 250.

REFERENCE.

2. Where, after a trial has commenced, the plaintiff obtains an adjournment for the purpose of a motion for leave to serve a reply, which motion is granted, it is not error on the part of the referee to refuse to commence the trial *de novo*. *Ct. of App.*, 1871, *White v. Smith*, 46 *N. Y.*, 418; reversing 1 *Lans.*, 469.
3. Under sections 272 and 173 of the Code, it is within the power of a referee to allow an answer which denies having information sufficient to form a belief, to be amended on the trial by inserting the words "knowledge or" before "information," so as to make it a sufficient denial within section 149 of the Code. *Ct. of App.*, 1871, *Bennett v. Lake*, 47 *N. Y.*, 93.
4. No vested right is obtained by the report of a referee until the report is confirmed, and judgment entered thereon. Until then, it is subject to the power of the court and to any law the legislature may pass affecting the remedy. [40 *N. Y.*, 561; 61 *Barb.*, 483.] *Supreme Ct.*, 1872, *Lewenthal v. Mayor, &c. of City of New York*, 61 *Barb.*, 511.
5. The rule that in order to support the judgment of a referee, it will be assumed that he found other facts in addition to those set forth in his report, does not apply to sustain the claim of the respondent, that the accounts exceeded four hundred dollars, so as to entitle the respondent to costs; for costs are a matter over which the referee has no jurisdiction. *Ct. of App.*, 1871, *Fuller v. Conde*, 47 *N. Y.*, 89.
6. A party must be held to have believed that each witness called by him was credible, and to have so presented him to the court. A referee has a right to find a witness mistaken; and if there is a contradiction between him and another, to decide the question of fact contrary to his statement. But he cannot judicially deem an uncontradicted witness, testifying against the party calling him, false and perjured, and, so holding, to infer the truth of the matter to be the reverse of what was testified. *Ct. of App.*, 1871, *Fordham v. Smith*, 46 *N. Y.*, 683.
7. If a referee in his report states only a general conclusion, without specifying the issues upon which he finds, the remedy of the party aggrieved is by a motion to *refer back* the cause for a further finding or to move for further findings. A motion to *set aside* the report as irregular may be denied in the discretion of the court. *Ct. of App.*, 1871, *Van Slyke v. Hyatt*, 46 *N. Y.*, 259; dismissing appeal from 10 *Abb. Pr. N. S.*, 58.
8. The right of a defeated party to have separate findings of fact and conclusions of law inserted by a referee in his report, is a substantial right. *Ct. of App.*, 1871, *Van Slyke v. Hyatt*, 46 *N. Y.*, 259.

REMOVAL OF CAUSES.

9. In an action on contract, tried by a referee, if the recovery is less than fifty dollars, the question whether the accounts of both parties exceeded four hundred dollars,—so as to entitle plaintiff to costs, under section 54, subd. 4 of the Code,—is to be determined by the facts found by the referee, rather than by his conclusions of law; and for this purpose his findings of fact are conclusive. *Ct. of App.*, 1871, *Fuller v. Conde*, 47 *N. Y.*, 89.
10. Rules applicable to a motion to set aside a referee's report for improper conduct with the successful attorney, undue influence, &c. *Gray v. Fish*, *Ante*, 213.

APPEAL; EXCEPTIONS; TRIAL.

REFORMATION OF INSTRUMENT.

MISTAKE, 1.

RELIGIOUS CORPORATIONS.

1. The relationship of pastor and people in the "Reformed Church in America," is purely ecclesiastical. Its ecclesiastical tribunals having determined the question of the existence of such relation, the courts will not inquire further into the fact. [10 *Am. Law Reg. N. S.*, 803; 8 *Cow.*, 457; 9 *Barb.*, 64.] *Supreme Ct.*, 1871, *Connitt v. Reformed Protestant Dutch Church of New Prospect*, 4 *Lans.*, 339.
2. Trustees of a religious corporation not empowered, without vote of society, to petition for bonding town in aid of railroad company. *Ct. of App.*, 1871, *People ex rel. Freeman v. Hulbert*, 46 *N. Y.*, 110, 117—reversing 59 *Barb.*, 446.

REMOVAL OF CAUSES.

1. The act of Congress of March 3, 1863, and the amendment of May 11, 1868,—which provide for removal into the United States courts of actions founded upon facts which occurred *during the rebellion*,—do not authorize the removal of an action for a cause accruing on the 14th of June, 1865. *N. Y. Superior Ct. Sp. T.*, 1871, *Mitchell v. Dix*, 42 *How. Pr.*, 475.
2. Upon an application for the removal of a cause under the act of Congress of 1789, the mandate of the statute that, where the proper steps have been taken to entitle the party to a removal, the State court "should proceed no further in the cause," is obligatory as well upon a court of appellate as of original jurisdiction. Where the motion for removal was improperly denied, an appellate court cannot disregard the error of the court below and affirm the judg-

SATISFACTION PIECE.

ment, although the order upon the motion be not appealable under section 11 of the Code, but can suspend or dismiss the appeal. *Ct. of App.*, 1871, *Holden v. Putnam Fire Ins. Co.*, 46 *N. Y.*, 1.

3. A petition for removal must show that the plaintiff was a citizen of the State in which the suit is pending, *at the time it was commenced*. A petition setting forth that the plaintiff "*is a citizen*" raises no legal presumption that he was a citizen at the commencement of the action. *So held*, where the petition was verified ten days after the action was commenced. *Id.*

COSTS, 9.

RESCISSION OF CONTRACTS.

Where a contract was void by the statute of frauds and was terminated by defendant's refusal to perform,—*Held*, that plaintiff's suit to recover back what he had surrendered pursuant to the contract was not an attempted rescission of a contract for non-performance within the rule, and that, as the securities which defendant had given never had any validity, plaintiff could recover without offering to return them. *Ct. of App.*, 1872, *Chapman v. McKay*,* 47 *N. Y.*, 670.

REVISED STATUTES.

A provision of the session laws forbidding any supervisor to be *appointed* a superintendent of the poor, was inserted in editions of the Revised Statutes later than the first, and numbered as if a part of the Revised Statutes.—*Held*, that an act amending it, referring to it by such numbering, was effectual, although the legislature had never before recognized such provision as part of the Revised Statutes. *Supreme Ct. Sp. T.*, 1872, *People ex rel. Furman v. Clute*, *Ante*, 399.

RULES.

It is competent for the judges in convention to make rules altering the practice previously settled by decisions of the courts. *Supreme Ct. Sp. T.*, 1871, *Havemeyer v. Ingersoll*, *Ante*, 301.

SATISFACTION PIECE.

1. A satisfaction piece of a judgment for the purpose of authorizing cancellation of the docket, is an instrument of as solemn a nature as a deed; when executed by an agent it must purport on its face to be executed in the name of the principal. Thus, a satisfaction

* No opinion reported.

SECURITY FOR COSTS.

piece running in the name of G., as president, and signed "G., President," without any seal of the corporation or other circumstance showing it to be the act of the corporation who recovered the judgment, is not binding upon the corporation. *So held*, in an action to charge the bank as for money received in payment of the judgment. *Supreme Ct.*, 1871, *Booth v. Farmers' & Mechanics' National Bank*, 4 *Lans.*, 301.

COUNTY CLERK, 2; JUDGMENT, 9-11.

SEARCH WARRANTS.

Search warrants allowed to issue for obscene articles. 2 *Laws of* 1872, p. 1795, ch. 747.

SEAL.

A seal is presumptive evidence that full consideration was received by the principal; and proof that the surety received nothing does not exonerate the surety. *Ct. of App.*, 1872, *Petrie v. Barckley*, * 47 *N. Y.*, 653.

SECURITY FOR COSTS.

1. An administrator appointed in this State, and resident within the jurisdiction of the court in which he sues, will not ordinarily be required to give security for costs, under section 317 of the Code of Procedure, in the absence of mismanagement or bad faith. *Buffalo Superior Ct. Sp. T.*, 1872, *Norris v. Breed*, *Ante*, 185.
2. A defendant sued by an infant who appears by a guardian, duly appointed by the court for the purpose, has not a strict right pending the action to demand security for costs and have a stay of proceedings until it be given. The practice of suing by a next friend is of necessity repealed by section 115 of the Code. The new system nowhere provides for the guardian of an infant giving bail, but gives the defendant an equivalent, in section 316, by making the guardian liable. *Supreme Ct.*, 1870, *Linner v. Crouse*, 61 *Barb.*, 289.
3. As the court have power to require trustees, &c., to give security for costs either already accrued, or afterwards to accrue, or both, and either before or after judgment, their exercise of discretion in so doing cannot be reviewed on appeal by this court. *Ct. of App.*, 1872, *Gedney v. Purdy*, * 47 *N. Y.*, 676.

* No opinion reported.

SET-OFF.

SERVANT.

Who may recover, as servant of manufacturing corporation, against officers and stockholders. *Vincent v. Bamford, Ante, 252.*

SERVICE (AND PROOF OF).

1. Plaintiff's attorney, going to serve the summons and complaint in an action of ejectment, to recover premises occupied by the tenant of defendant, met defendant, who told him that he lived in and was in possession of the premises, whereupon plaintiff's attorney served the papers on him.—*Held*, that defendant was afterwards estopped from setting up that he was not the occupant of the premises at the time. *Ct. of App., 1872, Finnegan v. Carraher, 47 N. Y., 493.*
2. Receiving papers, served by mail, but insufficiently prepaid, and replying without objecting to the service, is a waiver of the irregularity in pre-payment. *Supreme Ct. Sp. T., 1872, Sherman v. Gregory, 42 How. Pr., 481.*
3. In an affidavit to obtain an order of publication, in a foreclosure suit, *it seems*, that a statement that the defendants are absent and reside in a foreign State, is sufficient to dispense with proof of efforts to find the defendants in this State. *Allen v. Malcolm, Ante, 335.*
4. To obtain an order allowing service of summons by publication, in a foreclosure suit, an affidavit of the non-residence of the defendant, made on information and belief, is sufficient. *N. Y. Com. Pl. Sp. T., 1872, Steinle v. Bell, Ante, 171.*
5. An affidavit of a person that he deposited a copy of the summons and complaint "duly directed" to the defendant "at Belleville, New Jersey, and paid full postage thereon, there being a regular mail communication between the city of New York and Belleville, New Jersey,"—*Held*, sufficient to show a deposit of the summons and complaint, duly directed, &c., in the post-office at *New York. Ib.*

COSTS; INJUNCTION, 1; SUMMARY PROCEEDINGS; TIME.

SET-OFF.

1. Ordinarily, no one can insist that property is subject to a trust, or that a conveyance is in violation of the terms of a trust, who has not an interest in supporting the trust; but, when a trustee is endeavoring to avail himself of a set-off of demands held by him as a trustee against demands owing by him personally, the holder of the latter has the right to insist that the person seeking the set-off

STAMPS.

shall show, in order to entitle him to a set-off, that the claims in suit are due by the defendant in the same right as that in which he seeks to make a set-off. [2 Stat. at L., 365, § 18.] And a trustee cannot set off a demand held by him, as trustee, against one owing by him personally. 1 Wait's L. & P., 369; Waterman on Set-Off, 299, 210; 7 Cow., 480; 16 East, 130; 2 Caines, 34 a.] *Supreme Ct.*, 1871, *Foster v. Coe*, 4 *Lans.*, 53.

2. Rights of set-off between joint and several contracts, in case of insolvency, and at law and in equity, determined. *Perry v. Chester*, *Ante*, 131.

SHERIFF.

1. The order of a State court should be a complete protection to their sheriff for all purposes, in the bankrupt court. *Supreme Ct.*, 1871, *Tenth National Bank v. Sanger*, 42 *How. Pr.*, 179.
2. Application to the court by motion, for relief, is not necessary before bringing an action against a sheriff for negligence in allowing an escape through entire failure to execute a writ of *ne exeat*, issued by order of the court. *Supreme Ct.*, 1870, *Beckwith v. Smith*, 4 *Lans.*, 182.
3. Although by 2 *Rev. Stat.*, 645, the sheriff is allowed certain fees for executing process, and for "serving an execution for the collection of money," neither the Revised Statutes nor the Code of Procedure make any allowance to a sheriff for the fees of a person employed by him to watch and take care of property levied on under an execution issued to him. *N. Y. Com. Pl.*, 1870, *Lynch v. Meyers*, 3 *Daly*, 256.
4. The taxation of the sheriff's fees on an execution cannot be had on the requisition of the sheriff himself, but only on that of the defendant in the execution, upon objection made by him. *Ib.*

COSTS, 11-13; EXECUTION, 3-6.

SHIPPING.

The terms "vessel, used in rivers or inland navigation," in the act of Congress limiting liability of ship owners, do not apply to a tug navigating the St. Lawrence river. *Supreme Ct.*, 1871, *Baird v. Daly*, 4 *Lans.*, 426.

SPECIFIC PERFORMANCE.

PARTIES, 24; PLEADING, 6.

STAMPS.

It is not within the constitutional power of Congress to prescribe for

SUBMISSION OF CONTROVERSY.

the States a rule for the transfer of property within them, and a deed of land is operative and valid although not stamped. *Ct. of App.*, 1872, *Moore v. Moore*, 47 *N. Y.*, 467.

EVIDENCE, 25.

STATUTES.

1. Effect of statute authorizing one of two justices to hold court when the other is absent through disability. *People v. Davis*, 61 *Barb.*, 456.
2. Rules of construction. *Buffalo City Cemetery v. Buffalo*, 46 *N. Y.* [No. 2], 506; *N. Y. & Harlem R. R. Co. v. Kip*, *Id.*, 546; *Smith v. People*, 47 *Id.*, 330.

PLEADING, 2; MOTIONS AND ORDERS, 8; REVISED STATUTES.

STAY OF PROCEEDINGS.

Where a judgment creditor's attorney, notwithstanding a pending stay of proceedings on the execution, procures from the sheriff the proceeds of a levy made under it, the court will, on motion, order such proceeds to be returned to an officer of the court, to abide its further order. *N. Y. Com. Pl.*, 1870, *Leland v. Smith*, 3 *Daly*, 309; modifying 11 *Abb. Pr. N. S.*, 231.

STIPULATION.

1. To carry out a compromise, plaintiffs gave a stipulation, which provided that it should not take effect until signed by defendants personally and by their attorneys, and by plaintiffs' attorneys. This stipulation was signed by defendants and their attorneys, and was accepted by plaintiffs, together with a payment of money under it. —*Held*, that the stipulation was not thereafter voidable for want of signature by plaintiffs' attorneys. *Supreme Ct.*, 1871, *Board of Supervisors of Orleans Co. v. Bowen*, 4 *Lans.*, 24.
2. Stipulation, made as a condition of opening a default, that an affidavit may be read in evidence at the trial, in the absence of the affiant,—enforced. *N. Y. Com. Pl.*, 1869, *Ynguanzo v. Salomon*, 3 *Daly*, 153.

SUBMISSION OF CONTROVERSY.

A submission under section 372 of the Code is to be had only when the case agreed upon presents nothing but questions of law. [3 *Duer*, 455.] The question whether an assignment was fraudulent, being one of fact [2 *Rev. Stat.*, 137, § 4; 31 *N. Y.*, 457; 6 *Hill*, 433], cannot be submitted. *Ct. of App.*, 1871, *Clark v. Wise*, 46 *N. Y.*, 612; reversing 57 *Barb.*, 416; *S. C.*, 39 *How. Pr.*, 97.

SUPPLEMENTARY PROCEEDINGS.

SUMMARY PROCEEDINGS

1. By Revised Statutes, as amended since the decision in *Benjamin v. Benjamin*, 5 *N. Y.*, 388 (1 *Laws of 1857*, ch. 684, § 2), the matters in controversy in such proceedings may be tried by the magistrate without a jury. *Supreme Ct.*, 1871, *People ex rel. Sliker v. Hovey*, 4 *Lans.*, 86.
2. What facts show the conventional relation of landlord and tenant, within the statute. *Ib.*
3. The oral testimony of a constable, to the service of a summons, is "due proof" of such service before a justice, and "proceedings to recover possession of land," may be founded thereon; and this, although such testimony be supplementary to a written and sworn return (2 *Rev. Stat.*, 514, § 32). *Supreme Ct.*, 1871, *Robinson v. McManus*, 4 *Lans.*, 380.

SUMMONS.

1. The summons in a penal action should not be set aside because of neglect to indorse thereon a reference to the statute on which the action was brought, as required by 2 *Rev. Stat.*, 481, § 7, if the summons and complaint were served together, and the complaint supplied all the information which the indorsement should have given. It would be otherwise if the complaint were not served. *Supreme Ct.*, 1872, *Cox v. N. Y. Central, &c. R. R. Co.*, 61 *Barb.*, 615.
2. Proper form of summons in penal action, and when summons may be set aside for variance. *Abbott v. N. Y. Central R. R. Co.*, *Ante*, 465.

PARTIES, 30; SERVICE (AND PROOF OF).

SUPERVISORS.

The supervisors of a county may compromise and settle a judgment recovered by them for the county, pending an appeal therefrom. *Supreme Ct.*, 1871, *Supervisors of Orleans County v. Bowen*, 4 *Lans.*, 24.

SUPERSEDEAS.

BAIL, 1.

SUPPLEMENTARY PROCEEDINGS.

1. Supplementary proceedings cannot be sustained on the return of a marshal to an execution issued out of a district court. The act of 1865, p. 738, ch. 400, § 2, only refers to process issued by the marine court. *N. Y. Com. Pl. Sp. T.*, 1869, *Muldowney v. Corney*, 3 *Daly*, 170.

SURROGATES' COURTS.

2. On an application in supplementary proceedings, for an order compelling a third person to pay over, or apply to the judgment, property in his hands, or a debt, belonging to the judgment debtor, if such person, under oath, claims an interest in such property or denies the debt, the judge cannot proceed summarily to examine into the fact; but the judgment creditor must be left to the appointment of a receiver of the property of the judgment debtor, and an action by him against the third party. *Ct. of App.*, 1872, *West Side Bank v. Pugsley, Ante*, 28.
3. In supplementary proceedings the court have no power to order a third person to pay over money or property on the allegation that it belongs to the debtor, if his right is disputed; and a bailee who, in compliance with such an order, applies his bailor's property as if it belonged to the debtor, is not protected by the order. *N. Y. Com. Pl.*, 1871, *Barnard v. Kobbe*, 3 *Daly*, 373.

CHATTEL MORTGAGES, 2.

SUPREME COURT.

1. *It seems*, that the supreme court, in general term, has the inherent right to review any proceedings in the court, where the power is placed generally in the supreme court, and is not by statute confined to the special term. *Supreme Ct.*, 1871, *Matter of Commissioners of Central Park*, 61 *Barb.*, 40.
2. Assignment of general terms provided for. 2 *Laws of 1872*, p. 1855, ch. 778, § 1; amending 2 *Laws of 1871*, p. 1768, ch. 766.

SURPLUS MONEYS.

FORECLOSURE, 3, 4; INTEREST; LEASE.

SURROGATES' COURTS.

1. Citation of idiots and insane persons to be served on their guardian or committee of person or estate; or, if there be none, then personally, and also on the person having custody of them, in which case the surrogate shall appoint a special guardian. 2 *Laws of 1872*, p. 1572, ch. 693.
2. Claims against an executor for property which has not come into his possession, but was received by his testator as executor, must be collected as other claims against an estate. The surrogate cannot compel an executor who has not received it to account for such property because received by the testator as executor. [6 Paige, 95.] *Supreme Ct.*, 1871, *Montross v. Wheeler*, 4 *Lans.* 99.
3. Necessity of security for costs on appeal from surrogate. Omission

TRESPASS.

to give in season not amendable. *Ct. of App.*, 1872, *Spotts v. Dumesnil*, *Ante*, 117; *Dumesnil v. Spotts*, *Ante*, 128, note.

EXECUTORS AND ADMINISTRATORS, 9.

TAXES.

1. When the assessors are regarded as acting judicially, and therefore not liable to action. *Dorn v. Backer*, 61 *Barb.*, 597; *Wade v. Matheson*, 4 *Lans.*, 158; *People ex rel. Am. Linen Thread Co. v. Howland*, 61 *Barb.*, 273.
2. Mode of assessing corporations, and rules affecting application to reduce tax. *People ex rel. Am. Linen Thread Co. v. Howland* (*above*). *Buffalo City Cemetery v. Buffalo* [No. 1], 46 *N. Y.*, 503.
3. Farms divided by county lines. *Laws of 1872*, ch. 355.

TENDER.

A tender having been refused because not made in time, objection cannot afterwards be taken that the tender was not in money. *Ct. of App.*, 1871, *Duffy v. O'Donovan*, 46 *N. Y.*, 223.

TIME.

"Weeks," how computed, under order of publication. *Steinle v. Bell*, *Ante*, 171.

TOWNS.

Town certificates of indebtedness for bounty constitute a debt against the town under section 1, ch. 8, *Laws of 1864*, and the town may be sued thereon, without presenting the claim to the board of town auditors. [2 *Hill*, 46.] *Supreme Ct.*, 1871, *Brown v. Town of Canton*, 4 *Lans.*, 409. And see *Holden v. Putnam Fire Ins. Co.*, 46 *N. Y.*, 9.

TRADEMARKS.

Damages ought not to be recovered against a defendant, who in ignorance of the plaintiff's rights and claims, has used a trademark belonging to the plaintiff. *Supreme Ct.*, 1872, *Weed v. Peterson*, *Ante*, 178.

TRESPASS.

1. *It seems*, that an action can be maintained by the owner of land for an entry thereon and ouster, but damages can only be recovered for the simple entry and ouster and not for the continuation of the trespass. Those damages are only recoverable after possession has been regained. *Ct. of App.*, 1871, *Wohler v. Buffalo & State Line R. R. Co.*, 46 *N. Y.*, 686.
2. To warrant a judgment against parties as joint trespassers it must

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appear that they co-operated in producing the act which resulted in the trespass. [19 Johns. 382; 10 Wend., 654.] *N. Y. Com. Pl.*, 1869, *Olzen v. Schierenberg*, 3 *Daly*, 100.

3. One of several trespassers is not entitled to contribution from the others unless he acted innocently. [2 Johns. Ch., 131; 11 Paige, 18; 33 Barb., 354; 1 Hill. on Tort, 185, note a.] *N. Y. Com. Pl.*, 1872, *Wehle v. Haviland*, 42 *How. Pr.*, 399.

EXECUTION, 3, 4.

TRIAL.

1. A court or referee is presumed to have knowledge of the pleadings and their contents, and they need not be read in evidence in order that admissions therein may be available. *Ct. of App.*, 1871, *White v. Smith*, 46 *N. Y.*, 418; reversing 1 *Lans.*, 469.
2. It is error to instruct the jury that a party is bound to call a particular witness who seems to be able to explain evidence against him, if such witness is interested against the party. [1 Cow. & H., 310.] *Supreme Ct.*, 1871, *Coykendall v. Eaton*. 42 *How. Pr.*, 378.
3. The rule that an offer of evidence must be made in such terms as to leave no room for doubt as to its competency and materiality, under a proper definition of the law applicable thereto,—applied. *McGrath v. Bell*, 42 *How. Pr.*, 182.
4. If a witness is asked a question capable of a construction which makes it competent, it is not error to allow it, against a general objection, and the judgment will not be reversed on appeal, although the question is also capable of a construction which may render it incompetent, since it does not affirmatively appear that the court decided the precise point claimed as error. *Ct. of App.*, 1871, *Briant v. Trimmer*, 47 *N. Y.*, 96.
5. If there are reasons for the exclusion of testimony competent in itself, growing out of the proceedings on the trial, or the prior examination and statements of the witness, the attention of the court must be called to them. A general objection is insufficient. *Ct. of App.*, 1871, *Williams v. Sargeant*, 46 *N. Y.*, 481.
6. Where a fact not in itself, or in view of attending circumstances, incredible or improbable, is positively testified to by witnesses who are unimpeached and uncontradicted, it is error if the court submit it to decision of the jury. The mere raising of a question as to the credibility of a witness does not alter the rule. *Supreme Ct.*, 1871, *Robinson v. McManus*, 4 *Lans.*, 380.
7. The production of the books of a bank having been waived by the counsel of a prisoner on trial, the testimony of the book-keeper as to the contents, was held competent to prove no funds. *Ct. of App.*, 1872, *Smith v. People*, 47 *N. Y.*, 303.

TRIAL.

8. Allowing the question, to a medical witness,—can you state as to the probable result and extent of the injury,—*Held*, not error. *Ct. of App.*, 1871, *Briant v. Trimmer*, 47 *N. Y.*, 96.
9. The right of a party to examine his own witnesses upon material facts, and not to be precluded by answers made upon the examination of his adversary, is subject to the discretion of the court; and a refusal to permit such examination after the witness has fully testified upon the subject of the proposed examination, is not ground of reversal, unless it can be seen the party has been injured or prejudiced. [4 *Hill*, 202; 1 *Id.*, 300; 20 *Wend.*, 225.] *Ct. of App.*, 1872, *Caldwell v. N. J. Steamboat Co.*, 47 *N. Y.*, 282; affirming 56 *Barb.*, 425.
10. Upon demurrer to a complaint to charge executors as such, the action cannot be converted into one against the defendants individually. *Ct. of App.*, 1872, *Austin v. Munro*, 47 *N. Y.*, 360.
11. The rule that a question on conflicting evidence must be submitted to the jury,—applied. *Brooklyn Oil Refinery v. Brown*, 42 *How. Pr.*, 286; *Upton v. Bedlow*, *Id.*, 121; *Howard v. Smith*, *Id.*, 300; *Smith v. McNamara*, 4 *Lans.*, 169.
12. Permission to open a case after the testimony has closed, is discretionary with the court, and the decision thereon is not reviewable on appeal. *Ct. of App.*, 1872, *Caldwell v. New Jersey Steamboat Co.*, 47 *N. Y.*, 282; affirming 56 *Barb.*, 425.
13. Refusal of referee to re-open testimony after its close, in order to allow a defendant charged with fraud to testify that he had no fraudulent intent,—*Held*, error. *Supreme Ct.*, 1870, *Hubbell v. Alden*, 4 *Lans.*, 214.
14. The judge cannot, on the trial, take the assessment of damages from the jury, nor suspend judgment and order the exceptions to be heard in the first instance at general term, except upon an uncontradicted state of facts. *N. Y. Com. Pl.*, 1871, *Fey v. Smith*, 3 *Daly*, 386.
15. Where there are disputed questions of fact and the court directs a verdict for defendant, the plaintiff's exception to such direction is sufficient to present on appeal the question of law, as to whether the case should have been submitted to the jury, and it is not necessary to request the court to submit the question to the jury. [Distinguishing 12 *N. Y.* (2 *Kern.*), 18; 18 *Id.*, 558.] *Ct. of App.*, 1872, *Stone v. Flower*, 47 *N. Y.*, 566.
16. Proper charge as to negligence of deceased in going upon railroad track. *Madden v. N. Y. Central R. R. Co.*,* 47 *N. Y.*, 665.

* No opinion reported.

TRIAL.

17. The jury may not consider the charge of false swearing, made by the defendant against the plaintiff at the time of committing an assault, as one of the circumstances to enhance the damages, in an action for the assault. *Supreme Ct.*, 1871, *Pulver v. Harria*, 61 *Barb.*, 78.
18. Proper charge as to convicting of lesser degrees, under indictment for murder. *McNevins v. People*, 61 *Barb.*, 307.
19. Under an indictment for obtaining goods under false pretenses, it is not error to refuse to charge that the pretense must appear on the indictment to be such as could not be guarded against by an exercise of common sagacity and prudence. The sufficiency of the indictment is a question of law to be passed upon by the court, and is not to be submitted to the jury. *Ct. of App.*, 1872, *Smith v. People*, 47 *N. Y.*, 303.
20. It is not error for a judge to criticise, in his charge, the testimony of a witness, or to give his opinion as to the proper interpretation, construction, and effect of the language of the witness, unless it appears that the expression of the judge's opinion prejudiced the objecting party. *N. Y. Com. Pl.*, 1869, *Ynguanzo v. Salomon*, 3 *Daly*, 153.
21. Telling the jury they should be kept together three days if they did not sooner agree,—*Held*, a matter of discretion, and not reviewable upon a bill of exceptions. For abuse of such discretion, the remedy is by motion to set aside the verdict. *Ct. of App.*, 1872, *Caldwell v. N. J. Steamboat Co.*, 47 *N. Y.*, 282.
22. After a jury had retired, upon returning into court for further instructions, the judge remarked in substance, that he thought there was not much difficulty in arriving at a conclusion,—*Held*, not error, as no opinion was expressed. *Ib.*
23. Though, in an action of ejectment, the jury may only be required to answer specific questions of fact where they render a general verdict (*Code*, § 261), yet by consent they may find upon particular questions of fact, without finding such verdict, and in such case their finding is in the nature of a special verdict. *Supreme Ct.*, 1871, *Carr v. Carr*, 4 *Lans.*, 314.
24. Where a special verdict is rendered, and a general verdict is then directed by the court on the strength of the special findings, the general verdict does not add to the effect of the special findings; and the jury cannot be presumed to have found more than is specified; and defects in the special findings cannot be cured by intendment. *Ct. of App.*, 1872, *People v. Williamsburgh Turnpike R., &c., Co.*, 47 *N. Y.*, 586.

DAMAGES; EXCEPTIONS, 1-4; MANDAMUS; PLACE OF TRIAL;
REFERENCE; QUESTIONS OF LAW AND FACT.

 WAIVER.

UNDERTAKING.

1. Undertaking under the Code, when constitutes joint obligation. *Perry v. Chester, Ante*, 131.
2. An undertaking given in a justice's court, at the commencement of an action for chattels, and in the usual form, "for the prosecution of said action, and the return of said property to the defendant, if return thereof be adjudged, and for the payment to the defendant of such sum, as may for any cause be recovered against said plaintiff,"—extends to all the proceedings and adjudications, in the same action, through every court to which it may be carried by appeal, in case the party giving it is finally defeated. No matter in what court the rights of the parties are finally determined, an action will lie on such undertaking. [7 Wend., 434; 21 Id., 270; 28 Barb., 538; 20 N. Y., 99; 25 Id., 484; 2 Wait. Pr. & Pl., 197.] *Supreme Ct.*, 1871, *Letson v. Dodge*, 61 Barb., 125.
3. The provisions 2 *Rev. Stat.*, 533, sections 64 and 65 (5th ed., vol. 3, 848, §§ 25 and 26), are not applicable to undertakings given in actions of replevin commenced in justices' courts, under the provisions of the Code. *Id.*
4. *It seems*, that these provisions are not applicable to actions commenced in the supreme court, under the Code, for the recovery of personal property, but are repealed by the Code. *Id.*

BAIL, 1; EVIDENCE, 34; INJUNCTION, 23.

UNDUE INFLUENCE.

The hired clerk and nephew of an aged lawyer,—*Held*, not to stand in such a confidential relation as to avoid a deed of trust drawn by the former in his own favor, and executed by the latter under misapprehension of its irrevocable nature. *Fellows v. Heermans*, 4 *Lans.*, 230.

VARIANCE.

Variance between the complaint and the proof is immaterial after judgment. On an appeal an amendment may be ordered, so as to conform the allegations of the complaint to the evidence. *Supreme Ct.*, 1872, *Smith v. Holland*, 61 Barb., 333.

VILLAGES.

Mode of presenting claim to trustees of incorporated villages. 1 *Laws of 1872*, p. 876, ch. 357; amending 1 *Laws of 1870*, p. 674, ch. 291, tit. iii, § 10

WAIVER.

MARINE COURT, 4; TENDER.

WITNESS.

WARRANT.

COMMITMENT.

WILLS.

The act of 1864, as to recording exemplified copies of foreign wills affecting real estate in this State, made prospective, and extended to allow exemplified copies of recorded wills as well as of originals filed. *Laws of 1872*, ch. 680.

WITNESS.

1. Where husband and wife are plaintiff and defendant, each may, in general, testify in his or her own behalf. [2 *Laws of 1867*, ch. 887.] *Supreme Ct.*, 1870, *Minier v. Minier*, 4 *Lans.*, 421.
2. Section 8 of *Laws of 1832*, ch. 276,—which allows one of several parties to negotiable paper who are joined as defendants in one action under that act, to use any other such defendant as a witness the same as if separate actions were brought,—must be regarded as repealed by the Code of Procedure. And if the adverse party is a personal representative, a maker who is a defendant cannot testify on behalf of an indorser who is defendant, to a transaction personally had with the deceased. It is only by severing the action (which rests in the discretion of the court), that the party in such case will be made competent. *Supreme Ct.*, 1862, *Fox v. Clark*, 61 *Barb.*, 216, note.
3. In a controversy between the widow and the heirs-at-law and devisees, the testimony of the attorney who drew the will is not incompetent (by reason of privilege), in connection with other testimony, to show that a bequest in such will to the wife of the testator was made according to an agreement between the testator and his wife, the widow not objecting to such testimony. *Supreme Ct.*, 1872, *Sanford v. Sanford*, 61 *Barb.*, 293.
4. Disqualification of witness and of elector, under 2 *Rev. Stat.*, pt. 4, ch. 1, tit. 7, § 23; and *Laws of 1847*, ch. 240,—not to apply to convicts sentenced to a house of refuge or reformatory. 1 *Laws of 1872*, p. 259, ch. 113.
5. In an equity case where a party was examined as a witness,—*Held*, that it was not error to exclude a question put on cross-examination, the object of which was to prove that he had forfeited the subject of the action. *N. Y. Com. Pl.*, 1869, *Abernethy v. Society of Ch. of Puritans*, 3 *Daly*, 1.
6. A witness who was shown, by cross-examination, to have been once arrested for crime,—*Held*, entitled to state, on re-direct examination, conversations with third persons which led to his arrest, and
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WITNESS.

- which tended to show that the charge originated in his attempt to perpetrate a joke. *Supreme Ct.*, 1871, *Murphy v. Dart*, 42 *How. Pr.*, 31.
7. It is not error for a judge to charge the jury, in an action for conspiracy, that they may find for the plaintiffs, against the defendants, on the evidence of an alleged accomplice, even though unsupported and uncorroborated, at the same time properly instructing them as to the weight and value of such evidence, and the caution to be exercised in considering it. *N. Y. Com. Pl.*, 1869, *Ynguanzo v. Salomon*, 3 *Daly*, 153.
 8. Who are competent as skilled witnesses as to the construction of steamboats, and as to injuries to the person. *Tinney v. New Jersey Steamboat Co.*, *Ante*, 1.
 9. The testimony of a son as to representations made to him by his parents, is inadmissible to show the place of his birth. [5 *Cow.*, 314, 320; 8 *East*, 539, 542; 7 *Cranch*, 291; *Cow. & H. N.*, v. 1, p. 559, n. 432.] *Supreme Ct. Sp. T.*, 1871, *McCarty v. Deming*, 4 *Lans.*, 440.
 10. Evidence that a conversation was had between defendant and a deceased person, without proving the conversation itself, is not incompetent under section 399 of the Code, forbidding evidence of a "transaction" or communication between defendant and a deceased person. The fact of having a conversation is neither a transaction or communication within the meaning of the section. *Ct. of App.*, 1872, *Hier v. Grant*, 47 *N. Y.*, 278.
 11. *It seems*, it might be otherwise if the fact that a conversation was had was the material point. *Id.*
 12. In an action against the maker and indorsers of a note, commenced by the indorsee, but at the time of trial continued by and in the name of his executrix, the maker is not a competent witness to prove that the note was infected with usury at the time it was made, nor that the time of payment had been extended by an agreement between the testator in his lifetime and the maker. The fact that the maker did not put in an answer, but suffered default, does not sever the action or discontinue it as to him. *Supreme Ct.*, 1871, *Genet v. Lawyer*, 61 *Barb.*, 211.
 13. Nor does the fact that the indorsers executed a release to the maker affect the question. The defendants cannot, by any act of their own, change the statute, or take away the rights of the plaintiff under it. *Id.*
 14. In an action brought by the executors of a deceased partner, for an accounting and to wind up the affairs of the copartnership, a partner who has assigned all his interest in the partnership to a co-

WITNESS.

- partner, is not a competent witness to prove an agreement, between the deceased partner and the assignee, to allow such assignee compensation for his personal services for superintending and managing the affairs of the firm. *Supreme Ct.*, 1871, *Lyon v. Snyder*, 61 *Barb.*, 172.
15. It makes no difference that the assignor had no interest in such charge and item of the account, and the assignee's right to make it was not derived from the assignment, and did not depend upon it in any degree. The prohibition of the Code [§ 399], is not limited to an examination in respect to those matters pertaining to the parts of the cause of action assigned, but extends to the entire action. *Id.*
16. The section of the Code [399], which excludes "every person through whom a party to the action derives any interest or title by assignment or otherwise," from being a witness "in regard to any personal transaction or communication between such witness, and a person at the time of the examination of such witness deceased," &c., must be construed to mean any such interest or title, in or to the subject matter of the action, and an assignor of any such title or interest is altogether excluded from examination in the action. *Id.*
17. In an action brought by one heir against other heirs and the executors of the deceased, for the partition of the real estate and distribution of the personal estate of the deceased, the defendants claiming a portion of the property as advancements to them, the defendants offered to prove, by one of the defendants who was sworn as a witness in the action, that he overheard a conversation one new year's day, on which two deeds to the defendants, of real estate, were dated, in which conversation the deceased said to a third person, "I have this morning made each of my sons a present of a house and lot as a new year's present.—*Held*, that the witness was competent to testify to what the defendants offered to prove by him, for the reason that the offer was not to have the witness testify "in regard to any personal transaction or communication between such witness" and the deceased, which is prohibited by section 399 of the Code. But the evidence offered was hearsay, and would not, had it been received, have tended to establish that the houses and lots were not advancements. They were advancements though they were presents or gifts. *Supreme Ct.*, 1872, *Sanford v. Sanford*, 61 *Barb.*, 293.
18. Plaintiff having put in evidence letters by defendant to a person since deceased;—*Held*, that defendant was entitled to give testimony explaining away the letters, although such testimony related to a transaction with the deceased. *Id.*

WITNESS.

19. A witness incompetent to testify to a transaction directly, not competent to do so indirectly by negating other alternatives. *Grey v. Grey*, 47 *N. Y.*, 582.
20. The silence equally, with the declarations of the person since deceased, are excluded. *Supreme Ct.*, 1862, *Fox v. Clark*, 61 *Barb.*, 216, *note*.
21. A defendant, maker of a note, joined with the indorsers, and named in and served with the summons, is still a "party" to the action, and incompetent to testify in regard to any personal transactions between him and a person at the time of the examination of deceased. *Supreme Ct.*, 1871, *Genet v. Lawyer*, 61 *Barb.*, 211.
22. Evidence of the testimony given by a deceased witness, upon a former trial of the same cause, is not competent if he would not be a competent witness if living. *Ct. of App.*, 1872, *Eaton v. Alger*, 46 *N. Y.*, 345; affirming 57 *Barb.*, 179.

EVIDENCE, 81; REFERENCE; TRIAL.

THE END.

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